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Competition and Regulation in Professional Services – Note by Mexico

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More documents related to this discussion can be found at
www.oecd.org/competition/competition-and-regulation-in-professional-services.htm

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1. Introduction

1. In Mexico, in accordance with Article 5 of the Mexican Constitution,¹ state governments are responsible for regulating professional services in their respective territories. In general, state regulations determine: 1) which professions require a degree to exercise them, 2) requirements and procedures to register a professional degree, 3) requirements to practice a profession, 4) powers and functions of professional associations, and 5) sanctions for non-compliance with the law.²

2. From a competition perspective, any qualified person should be able to provide a professional service. This may require intervention through regulation to ensure quality of the services and to certify the skills of the professionals. However, excessive regulation tends to unduly restrict competition and provide advantages to incumbents. The promotion of pro-competitive laws may contribute to further competition, thus facilitating the participation of more professional services providers.

3. In this regard, Mexico's Federal Economic Competition Commission (Cofece or Commission) has recommended regulators to remove legislative restrictions that hinder professionals from practicing. Thus, contributing to the enhancement of competition benefits, such as wider supply, improved quality, and better prices.

4. This contribution presents three regulatory opinions issued by Cofece in 2016, 2018 and 2024 with recommendations to national and state regulators aimed at promoting pro-competitive regulations in professional services.³

2. Regulatory opinions

5. Lack of competition and excessive regulation has burdened the Mexican economy. Therefore, identifying and eliminating regulatory barriers and obstacles to the competition process using advocacy tools has been a priority for Cofece, which has established different mechanisms to be timely informed and intervene when draft laws or regulations unduly restrict competition. One mechanism is the assessment of the impact on competition of several regulatory documents and the issuance of regulatory opinions. To this end, Cofece monitors legislative activity by the Federal Congress to detect advocacy opportunities related to draft laws.

6. Also, in Mexico many issues are regulated at the subnational level (either state or municipal), so competition assessment opportunities related to the legal framework already in force or at the local level are considered on a case-by-case basis. As there is no definitive or exhaustive catalogue of these instruments and their topics, Cofece has conducted a

¹ Political Constitution of the United Mexican States, available (in Spanish) at: <https://www.diputados.gob.mx/LeyesBiblio/pdf/CPEUM.pdf>

² Cofece (2016). Miscelánea de obstáculos regulatorios a la competencia, p. 51, available (in Spanish) at: https://www.cofece.mx/cofeca/images/Promocion/Miscelanea_Estatal_210916.pdf#pdf

³ The assessment of the impact on competition of several regulatory documents and the issuance of opinions is made under article 12 of the Federal Economic Competition Commission Law

systematic review of laws and regulations in all 32 Mexican states and published the document: *Miscelánea de Obstáculos Regulatorios a la Competencia* (Miscellaneous of Regulatory Obstacles to Competition: analysis of state-level regulations). This effort was aimed at advocating for pro-competitive state-level legal frameworks. The document identifies regulatory obstacles that could affect competition in five different areas of great relevance for the economic activity: agriculture, public procurement, public transport, urban development, and professional practice. As a result, potential areas for regulatory reform from a competition perspective were identified.

7. Cofece has also put in place a tool for reporting regulatory obstacles to competition in the markets. This functionality allows individuals to report information regarding regulations which in their view hinders effective competition. Depending on the extent of the information provided by the report filed, Cofece could ask for further details. This to increase the likelihood of having information that is sufficient, precise, and reliable for a follow-up action by the Commission.

8. These efforts are complemented by the *Guía para la Evaluación de la Regulación desde la Óptica de la Competencia* (Guide for the Evaluation of Competition from the Perspective of Competition), a checklist issued by Cofece with the objective of guiding - from a technical and practical perspective- public officials so that they detect anti-competitive restrictions, either in draft regulations or in current laws, and find viable alternatives so as not to unduly affect the process of competition

3. Advocating for pro-competitive regulations of professional services

9. Cofece has issued three non-binding opinions on professional services. The first opinion under the file OPN-012-2015 addresses issues of a draft initiative that aimed at regulating professional services provided by lawyers. The second opinion, under the file OPN-008-2018 comments a draft law for public notaries in the state of Veracruz. The third opinion under file OPN-003-2023 deals with the secondary legislation for the law that regulates real estate professional service providers.

3.1. Recommendations on the initiative on the practice of law and the inherent responsibilities (OPN-012-2015)⁴

10. In February 2016, Cofece issued an opinion following an official request by citizens and a Senator to review a draft law that introduced mandatory requirements to provide professional legal services, which included joining a professional college (a bar). The draft law included a Constitutional reform to regulate the practice and inherent responsibilities of practicing legal defense services; and called out to national and subnational entities to establish mandatory requirements. Additionally, it sought to regulate the participation of professional organizations.

11. Cofece's regulatory assessment of the draft law⁵ identified three main risks that could hinder competition:

⁴ OPN-012-2015 published in February 2016 is available (in Spanish) at: <https://www.cofece.mx/CFCResoluciones/docs/Mercados%20Regulados/V9/1/2415052.pdf>

⁵ The opinion used various studies including OECD's Competitive Restrictions in Legal Professions and Competition in Professional Services ; along with judiciary precedents and thesis, such as the writ of amparo (appeal) 505/2007 (PROFESSIONAL ASSOCIATIONS. ARTICLE 44 OF THE REGULATORY LAW OF ARTICLE 5 OF THE CONSTITUTION, REGARDING THE

1. Additional mandatory requirements to practice that would represent artificial barriers to the entry of new providers of the professional services. These may restrict the supply of services and increase prices without necessarily guaranteeing better quality.
 2. Implementing a compulsory requirement of being enrolled in a college or bar association to practice law is an unbalanced scheme that would allow established economic agents, through associations or colleges, to decide on the entry or permanence of competitors. This is aggravated if the system implies restrictions regarding the number of associations or colleges of professionals allowed or standards of professional performance that could exclude a member or prevent him from subsequently exercising the profession, as the mentioned draft law proposes.
 3. The amendment of article 28 of the Mexican Constitution so that professional colleges and associations are not considered monopolies, could give rise to competition concerns since under certain circumstances, associations or colleges may serve as a means for anticompetitive practices.
12. Consequently, Cofece recommended: (i) not to establish a system of professional regulation that implies greater barriers and requirements, due to the risks that these could limit entry of new participants and restrict supply of professional services without justification; (ii) discard compulsory membership in a professional college or association as a one of the mechanisms to regulate the exercise of a profession given the potential negative impact on competition of this measure; and (iii) not to amend article 28 of the Constitution.
13. All three recommendations were successfully adopted since, two years after the proposal or the draft law, it was discarded. Therefore, we can conclude that the opinion issued had a positive impact on the adoption of its recommendations.

3.2. Recommendations regarding the draft law for the notary practice in the State of Veracruz (OPN-008-2018) ⁶

14. In August 2018, the local congress of the State of Veracruz published a draft law promoting a reform to the Law that regulates the practice of notaries (Notaries Law). The proposed legislation aimed to limit the number of notaries in the state and to widen the governor's capacity to discretionally publish vacancies and remove notary permits. The grounds of the draft law were the professionalization of local notaries and the introduction of autoregulation, led by the Notary Collegiate and the state governor, to reduce malpractices and corruption.

PRACTICE OF PROFESSIONS IN THE FEDERAL DISTRICT, BY LIMITING TO FIVE THE MAXIMUM NUMBER OF ASSOCIATIONS THAT CAN BE FORMED FOR EACH BRANCH, INFRINGES THE GUARANTEE OF EQUALITY, RELATED TO OCCUPATION AND ASSOCIATION LIBERTIES), available (in Spanish) at <https://sjf2.scjn.gob.mx/detalle/tesis/171224>, and the Constitutional Study on Economic Competition XCIII/2015. (ECONOMIC COMPETITION. ARTICLE 3 OF THE FEDERAL ECONOMIC COMPETITION LAW, VALID UNTIL JULY 6, 2014, DOES NOT VIOLATE ARTICLE 28 OF THE POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES), available (in Spanish) at <https://sjf2.scjn.gob.mx/detalle/tesis/2010020>.

⁶ OPN-008-2018 published in October 2018 is available (in Spanish) at: <https://www.cofece.mx/CFCResoluciones/docs/Opiniones/V87/1/4513633.pdf>

15. Through a regulatory assessment of the draft law, Cofece identified risks to competition, and issued an opinion. Cofece's exercise included a comparative study of provisions of the different states' laws on notarial practices allowing the understanding of this professional practice throughout the country.

16. Cofece's considerations included five key findings:

1. Limiting the number of notaries, or even establishing a minimum number of notaries per territory, would reduce the supply and negatively affect the quality of the services; for example, by increasing the waiting time of clients.
2. Introducing barriers to the entry of new competitors in the market may give rise to competition concerns, given that the new rules to obtain a permit to practice as a notary were overseen by the governor and collegiate notaries, meaning incumbents decided on the participation of potential new competitors.
3. Limiting advertising of notarial services to the local phone book, the notaries' association website and the notary web page prevents users of these services from reducing search costs.
4. Setting minimum fees reduces limits the ability of notaries to offer lower prices to the benefit of current or future clients.
5. Limiting notaries from providing a certain number of services beyond their territory by imposing criminal sanctions, would represent a loss of free exercise of the profession, in addition to preventing users from having access to alternatives of notarial services providers.

17. Thus, Cofece made recommendations to promote competition and prevent the adoption of a law that artificially limited the number of potential notarial service providers and the access of users to them, affecting consumers and the operation of markets that require these services for their efficient functioning.

18. Recommendations were: (i) allow the number and location of notaries to be naturally defined based on the needs of the population; (ii) eliminate the control that the notarial collegiates or associations would have over the admission process to establish new notarial offices; (iii) allow notaries to freely advertise their services; and, (iv) if necessary, establish maximum services fees, which would allow notaries to differentiate from other participants and compete through pricing.

19. After its acknowledgement in the Official Gazette of the Local Congress of the state of Veracruz, the initiative was referred to the legislative Commission on Justice and Constitutional Points, where the proposed amendment to the Notaries Law was not approved. The initiative was no longer discussed and removed from the agenda. The Notaries Law has not been reformed since 2015, the proposals from the draft law did not materialize; hence it is considered that the recommendations from the opinion paper were implemented.

3.3. Recommendations on the Bylaw that establishes the registration and accreditation of providers of real estate services in the state of Jalisco (OPN-003-2023)⁷

20. The opinion under file OPN-003-2023 was made within the framework of a collaboration agreement signed between Cofece and the government of the state of Jalisco through the Ministry for Economic Development.⁸ This agreement sought to lay the basis for joint advocacy efforts to promote competition policy and incorporate competition principles into the legal framework of the state. As a result, the state government requested an opinion on the draft bylaw that aimed at regulating providers of real estate services.

21. The objectives of both the draft bylaw and the law were to guarantee the quality and credibility of real estate professional services and to build a safe environment for consumers and practitioners, by ensuring the availability of enough and useful information to make purchase decisions and by building an environment of legal certainty. To this end, it included a scheme of voluntary accreditation and the creation of an official public registry of the real estate service providers in the state of Jalisco. However, the legislations had elements that could affect economic competition.

22. Cofece's opinion sets out two main concerns and five main recommendations to address them:

1. The law created an Interinstitutional Commission for the Supervision of Real Estate Services in the state of Jalisco (Interinstitutional Real Estate Commission) composed by representatives of real estate associations and public officials of the state. This gave rise to competition concerns since the interaction of its members could facilitate the exchange of information and the establishment of collusive agreements.
2. The powers that the Interinstitutional Real Estate Commission has, have an indirect impact on the accreditation and registration of real estate advisors and agents. Cofece considered this problematic, given the risk of discriminatory behavior or membership denial. Consequently, the opinion outlined the importance of having clear, reasonable, non-discriminatory, and proportional requirements and avoid those that allow the Real Estate Commission to deny, condition, or penalize the admission of an applicant or the permanence of already accredited agents.

23. Cofece made five recommendations so that the law and the bylaw fulfill their objectives without imposing restrictions on the process of free competition. In this regard, the bylaw should: (i) introduce mechanisms to prevent members of the Interinstitutional Real Estate Commission from suggesting, recommending, endorsing, or exchanging strategic information (pricing strategies, discounts, terms or conditions, customer or territory division, among others); (ii) provide that members of the Interinstitutional Real Estate Commission and real estate associations must be trained on competition law; (iii) delineate functions and responsibilities of the Interinstitutional Commission so that its role does not affect the accreditation, permanence, or departure of authorized service providers; (iv) avoid conditioning the accreditation or renewal on the purchase or hiring of different or distinguishable goods or services; (v) establish measures to prevent unduly discriminatory treatment through the amount of entry fees, technical capacity, and/or

⁷ OPN-003-2023 published in February 2024 is available (in Spanish) at: <https://www.cofece.mx/CFRCResoluciones/docs/Opiniones/V199/1/6060112.pdf>

⁸ The agreement can be found (in Spanish) at: <https://www.cofece.mx/wp-content/uploads/2023/07/Convenio-colaboracion-gobierno-de-Jalisco-Firmado.pdf>

training; and (vi) evaluate the costs that an additional accreditation procedure would result from the establishment of another training standard, valid only within Jalisco's boundaries.

24. Even though the opinion was published earlier this year, and it is too soon to determine its effects or adoption, Cofece considers it has been successful for assessing the role of the collaboration agreement behind it as well as facilitating the consultation of matters on market regulation and impacts on other sectors.

4. Final remarks

25. Regulation is an important element in the development of any economic activity because it may impact its efficiency, quality, and availability. In the grounds of professional services, regulation is an important tool that safeguards clients by certifying and ensuring the quality of the service. Cofece has worked closely in the regulatory analysis of professional services to advocate for pro-competitive reforms. Three examples of these efforts are opinions OPN-012-2015, OPN-008-2018 and OPN-003-2023 which have been discussed in this contribution. The first two opinions were considered successful, given that the draft laws were discarded; the third opinion was recently published, which is why the impact assessment and follow-up is still under evaluation.

26. A decade after the establishment of the Cofece, important factors that influence the adoption of recommendations published by the Commission. These include political will, public opinion, the legislative agenda, and legislator's workload. One key lesson is that collaboration with other public institutions facilitates Cofece's mandate of overseeing competition and free market access in all the territory.