



JULY 26, 2023



What was the purpose of the Advertising Law?

- Prevent media agencies from acquiring advertising space for their own account, requiring that they may only do so in the performance of a contractual mandate granted by a client;
- Require media agencies to transfer any discounts obtained from the media, in full, to clients, in order to prevent agencies from benefiting from such discounts;
- Prohibit media agencies from simultaneously providing services to clients and the media;
- Designate the Federal Economic Competition Commission (“COFECE”) as the agency in charge of the processing of complaints against violations of the Advertising Law.

Mexican Supreme Court invalidates Advertising Law

In response to the Law on Transparency, Prevention and Combating of Unfair Practices in Advertising Contracting (the “Advertising Law”), both the Federal Telecommunications Institute (“IFT”)[1] and COFECE[2] filed, for different reasons, constitutional controversies before the Mexican Supreme Court of Justice (“Supreme Court”) against the Mexican Congress and the Federal Executive Branch, seeking the invalidity of the decree that issued the Advertising Law, published in the Official Gazette of the Federation on June 3, 2021.

The IFT sought to be considered as the competent authority to rule on complaints of violations of the Advertising Law in relation to markets regulated by IFT, while COFECE sought to establish that the responsibility attributed to COFECE by the Advertising Law, was unconstitutional since it exceeded COFECE’s constitutional authority.

[1] CC 93/2021.

[2] CC 94/2021.



COMPETITION AND ANTITRUST NEWSFLASH

In addition to the constitutional controversies filed before the Supreme Court, IFT issued an opinion with antitrust concerns raised by the Advertising Law, such as the following:

- Mexican antitrust authorities (COFECE and IFT, within the scope of their respective jurisdiction) already have legal authority to investigate and sanction the conduct proposed to be regulated by the Advertising Law;
- The statute established measures that limited certain activities of media agencies in general, such as the sale of advertising space, when such limitations in any case should only apply to media agencies with substantial market power;
- The statute established obligations on media agencies that could facilitate the exchange of information raising confidentiality concerns;
- The statute required media agencies to pass on any discounts, which reduces incentives to obtain discounts;
- The statute restricted the freedom of media agencies to carry out economic activities such as the creation, execution and distribution of advertising campaigns, affecting advertisers and consumers;
- The statute generated unjustified regulatory costs that affected the efficient development of the market;
- The statute generated competitive disadvantages since some of its provisions only applied to agencies and not to the media.

From publicly available records, the antitrust concerns raised by IFT do not appear to have been addressed in the constitutional controversies before the Supreme Court as the controversies were decided on other grounds.



The Supreme Court resolved - by a majority of 8 votes of its 11 members - the controversy filed by COFECE, dismissing the controversy filed by the IFT, invalidating the decree by which the Advertising Law was issued, on grounds of infringement of the legislative process, specifically for violations to the principle of informed and democratic deliberation, as well as for violations to the rights of parliamentary minorities. In resolving the controversy, the Supreme Court did not address any antitrust considerations with respect to the Advertising Law.

The timely intervention of COFECE and IFT, autonomous constitutional agencies in antitrust matters, was decisive in allowing the Supreme Court to exercise its role as Mexico's Constitutional Court in reviewing the constitutionality of the Advertising Law and determining its invalidation.