COMPETITION & ANTITRUST - MEXICO

New law against improper advertising contracts has competition implications

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AUTHORS

Lucía Ojeda Cárdenas

Alejandra Magaña Cruz

Introduction

After gaining fast-track approval, President López Obrador issued the Law for Transparency, Prevention and Combating Improper Practices in Advertising Contracting (the Advertising Contracting Law) in the Official Gazette on 3 June 2021. This will become effective on 2 September 2021 and will grant new powers to the Federal Economic Competition Commission (COFECE) but may fall outside the constitutional objectives of the competition authority. Application of the new law may be problematic and may disregard the competence of the Federal Telecommunications Institute (IFT).

The Advertising Contracting Law, in general, provides that:

- Agencies may only acquire advertising spaces on behalf of and for an advertiser, and may not acquire them on their own account for subsequent resale.
- Agencies providing services to advertisers may not simultaneously render services to media outlets. In that case, companies from the same group can respectively provide services to advertisers and media companies.
- Agencies may only receive remuneration for the services provided to the advertisers, as set out in the corresponding contract. Neither an agency nor third parties employed by it may receive remuneration or benefit in any way from a media company.
- Any discount granted by the media company to an agency must be transferred in full to the advertiser.
- Advertisers may control the execution of the advertising campaign.
- These provisions are applicable regardless of the place of establishment of an agency, as long as the advertiser is a Mexican resident and the advertisement is disseminated in Mexico.
- The sanctions contemplated range from 2% to 4% of a company's revenue.

COFECE is the entity responsible for enforcing the Advertising Contracting Law, by processing complaints arising in accordance with the procedures provided for by the Federal Economic Competition Law (FECL).

Background

In November 2020, a proposal was presented to the Congress to regulate the advertising market. According to this document, practices such as conflicts of interest derived from the fact that agencies are generally paid by both the advertiser and the media company were negatively affecting the market. This and similar practices create incentives for agencies to select the media outlet that gives them the highest remuneration, even if this goes against the advertiser's best interest. Moreover, many agencies acquire advertising spaces from media companies at special prices only to resell them with mark-ups and thus increasing prices. Additionally, the proposal emphasised there is a considerable lack of transparency in the market.

The proposal concluded that these practices distort the functioning of the advertising market and, ultimately, constitute undue advantages in favour of certain sectors. In particular, corruption regarding government advertising contracts might be incentivised.

In this context, the proposal pointed out that these practices are already regulated in other jurisdictions. The French Sapin Law, for example, states that agencies acting on behalf of an advertiser may not receive any remuneration from media companies, only from services rendered to the advertiser, eliminating the possibility of double payment. Similarly, agencies may not purchase advertising spaces on their own account for resale. In

other countries, such as the United Kingdom(1) and the United States.(2) investigations and studies have hinted at a lack of transparency in their own advertising markets. And even though the practices analysed were not considered anticompetitive, such findings have promoted the adoption of self-regulation.

In light of such reasoning, the proposal included provisions to regulate these negative practices, which now have the force of law, following the enactment of the Advertising Contracting Law.

Comment

While prevention of conflicts of interest, combating corruption and promoting transparency for customers are legitimate purposes, the new provisions raise several questions. Without a previous and thorough study to evaluate the dynamics of the advertising market,(3) and the possible effects of adopting the new law, the effects of its implementation – for instance, whether it may distort competition in the advertising and related markets – are unclear.

Beyond this concern, there is also the question of whether the legislative purpose is consistent with the competition objectives contemplated in the Mexican Constitution and the FECL. Paradoxically, it could be argued that the restrictions imposed on the agencies might constitute barriers to competition, since they could be considered as a "legal provision issued by any level of government that unduly impedes or distorts the process of competition and free market access".

Moreover, relying on COFECE for the enforcement of the Advertising Contracting Law could be incompatible with the provisions of the FECL. Currently, the FECL only contemplates investigations for monopolistic practices (abuse of dominance and cartels), unlawful concentrations, barriers to competition or essential facilities, and determination of market conditions. While it also includes procedures such as merger control, leniency programmes and submission of undertakings, interlocutory proceedings, opinions concerning licences and permits, formal opinions and general orientations, it is not clear whether the FECL comprises a suitable procedure to review and enforce compliance with the Advertising Contracting Law.

Independently of the above, COFECE initiated an investigation last August in the market for digital advertising services and related services.(4) This investigation related to possible relative monopolistic practices (abuse of dominance) consisting of tied selling or raising costs, hindering production or reducing demand from other economic agents, which is a procedure regulated by the FECL.

Finally, the Advertising Contracting Law is arguably also inconsistent since it only refers to COFECE as the competent entity for processing complaints, when some advertising is broadcast via television and radio, over which the IFT should have jurisdiction.

To challenge the application of the new law, economic agents that consider themselves negatively affected by it may submit an amparo claim before the Federal Judicial Branch. Additionally, COFECE, the IFT, or both, are entitled to file a constitutional proceeding if they deem the new Advertising Contracting Law contradicts Article 28 of the Mexican Constitution. In fact, the IFT has recently issued a press release informing that the Advertising Contracting Law affects its autonomy, and it will therefore submit this kind of proceeding.(5)

For further information on this topic please contact Lucía Ojeda Cárdenas or *Alejandra Magaña Cruz at SAI Law & Economics by telephone (+52 55 59 85 6618) or email (loc@sai.com.mx or amc@sai.com.mx). The SAI Consultores website can be accessed at www.sai.com.mx.*

Endnotes

(1) See, for example, UK regulator Ofcom's decision here and trade body ISBA's study here.

(2) See ,for example, US trade body ANA's study here.

(3) Article 96 of the Federal Economic Competition Law contemplates a procedure to determine the market conditions that can be initiated by request of the executive branch.

(4) File No. IO-003-2020. See COFECE release available here.

(5) For further details please see the press release issued on 24 June 2021