

# Dominance 2019

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# Dominance

## 2019

**Consulting editors****Patrick Bock, Kenneth Reinker and David R Little****Cleary Gottlieb Steen & Hamilton LLP**

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Dominance*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Colombia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb Steen & Hamilton LLP, for their assistance with this volume.



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March 2019

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## GENERAL FRAMEWORK

### Legal framework

- 1 | What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

Article 28 of the Mexican Constitution prohibits monopolies and monopolistic practices. This constitutional rule is implemented by the Federal Law of Economic Competition (LFCE), which provides regulation on merger control, absolute monopolistic practices (horizontal restraints or collusive agreements) and relative monopolistic practices. The LFCE defines 13 specific types of conduct that are considered as relative monopolistic practices, referred to as unilateral exclusionary or predatory conduct performed by economic agents having substantial market power in the relevant market. Provisions on relative monopolistic practices are the ones specifically applying to the behaviour of dominant firms.

The LFCE does not use the term 'dominance'. Its equivalent term is 'substantial market power', which may be defined as the capacity to fix prices or restrict the supply to the relevant market without competitors being actually or potentially capable of counteracting such capacity.

The LFCE is enforced by the Federal Economic Competition Commission (CFCE) and the Federal Telecommunications Institute (IFT). The CFCE has jurisdiction over all industries, with the exception of broadcasting and telecommunications where the LFCE is enforced by the IFT.

In this chapter, any references to the CFCE will also apply to the IFT in the context of the broadcasting and telecommunications industries. The acronym CFC will be used for the former Federal Competition Commission.

### Definition of dominance

- 2 | How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

As mentioned in question 1, 'substantial market power' is the equivalent concept to dominance under Mexican law. The LFCE does not explicitly define substantial market power but enunciates the elements to be analysed in order to determine whether one or more economic agents enjoy such a power.

One of these elements is 'the capacity to fix prices or substantially restrict the supply to the relevant market without competing agents being actually or potentially capable of counteracting such capacity', which is, in fact, the definition of substantial market power.

Other elements to be analysed in order to assert that an economic agent holds substantial market power are: the existence of barriers to entry and the factors that may alter those barriers; competitors' existence and power; and access to input materials.

### Purpose of the legislation

- 3 | Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The LFCE states that its object is 'to promote, protect and guarantee free competition, as well as to prevent, investigate, fight, effectively pursue, severely punish and eliminate monopolies, monopolistic practices, unlawful mergers, barriers to free competition and other restrictions to the efficient operation of markets'. The underlying standard of the legislation is also strictly economic.

### Sector-specific dominance rules

- 4 | Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Relative monopolistic practices, which cover abuse of dominance as well as vertical restraints, are investigated and sanctioned under the LFCE, which applies to all sectors equally.

Additionally, certain sector-specific legislation empowers the corresponding agency to establish economic regulation (tariffs, standards of quality or information obligations) when it is determined that a firm has substantial market power or effective competition does not exist in a particular market. These situations must be previously declared by the CFCE under a specific procedure regulated in the LFCE, hereinafter referred to as the 'dominance procedure'. Some sector-specific provisions providing this kind of economic regulation are article 47 of the Railroad Service Law, articles 67, 68 and 70 of the Airports Law, article 43 of the Civil Aviation Law, article 140 of the Navigation and Maritime Trade Law, article 82 of Hydrocarbons Law and articles 279 to 284 of the Federal Law of Telecommunications and Broadcasting (in this case the procedure is followed before the IFT).

In other industries, such as ports (article 62 of the Ports Law), the authority may impose specific regulations on tariffs and prices. Notwithstanding this, the economic agents may ask the authority to remove or modify the regulation, whenever they obtain from the CFCE a resolution stating that competition conditions exist in the corresponding market.

In addition to the economic regulation mentioned above, in the broadcasting and telecommunications industries, the IFT is empowered to determine whether a company is a preponderant agent, in order to impose regulations to avoid damages to competition (related, for example, to information, offer and quality of services, exclusive agreements, tariffs, etc). The threshold to be declared as a preponderant agent is to have a national market share of 50 per cent or more in the specific sector (telecommunications or broadcasting), measured in terms of users, subscribers, audience, traffic or capacity.

### Exemptions from the dominance rules

- 5 | To whom do the dominance rules apply? Are any entities exempt?

Pursuant to article 3, section I and 4 of the LFCE, dominance provisions apply to any person engaged in any economic activity, including government entities expressly. In this regard, it is worth mentioning that article 28 of the Constitution prohibits monopolies and monopolistic practices. Notwithstanding, this constitutional provision also states that certain 'strategic' economic activities that are performed by the state under an exclusive basis, such as postal services, nuclear energy generation and certain activities related to petroleum and electricity, are not considered as monopolies. Although this exemption is reproduced by article 6 of the LFCE, the same article establishes that the state entities responsible for the aforementioned activities are subject to the LFCE regarding 'the acts not expressly comprehended' in the constitutional provision.

### Transition from non-dominant to dominant

- 6 | Does the legislation only provide for the behaviour of firms that are already dominant?

Mexican legislation only provides for the behaviour of already dominant firms. Issues regarding the acquisition or strengthening of substantial market power are specifically addressed in merger control provisions.

However, relative monopolistic practices provisions might indirectly cover conduct through which a non-dominant company becomes or attempts to become dominant, when a monopolist firm in certain relevant markets unlawfully uses its power to monopolise other markets. In any case, the conduct would be covered by the LFCE only if it is performed in connection with goods or services pertaining to the relevant market where the defendant enjoys substantial market power.

### Collective dominance

- 7 | Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Yes, collective dominance is covered by the legislation. The LFCE does not explicitly define 'collective substantial market power', but its Regulatory Provisions enunciate the elements that have to be analysed in order to determine whether several economic agents possess such a power. Article 9 of the above-mentioned regulations states that in order to determine if two or more agents have 'collective substantial market power' the CFCE must consider: if the economic agents distinguish themselves from other economic agents that participate in the relevant market, taking into account factors that promote common incentives or interdependent strategic behaviour; and if the economic agents show similar behaviour.

### Dominant purchasers

- 8 | Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The LFCE applies to both purchasers and suppliers with no differences. However, legal actions against abuse of dominance conduct by purchasers have been rare in practice.

Moreover, there are some types of conduct that, by their nature, can only be performed by suppliers, such as refusal to deal, predatory pricing and cross-subsidies.

### Market definition and share-based dominance thresholds

- 9 | How are relevant product and geographic markets defined? Are there market-share at which a company will be presumed to be dominant or not dominant?

Market definition is the same for all procedures regulated in the LFCE (dominance procedures, relative monopolistic practices investigations and merger control procedures). Article 58 of the LFCE establishes the elements to be analysed in order to define a relevant market. In general terms, the definition of a relevant market must include the product or service and its close substitutes, as well as the geographical area where the said product or service is offered or demanded.

There is no market-share threshold above which a company is presumed to be dominant. The analysis to conclude whether or not an economic agent has substantial market power must be made on a case-by-case basis. The most important elements to be analysed in order to assert that an economic agent holds substantial market power are: the market share of the economic agent subject to analysis and how it compares with its competitors' market shares; the existence of barriers to entry and the factors that may alter those barriers; and the access to input materials.

## ABUSE OF DOMINANCE

### Definition of abuse of dominance

- 10 | How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The term abuse is not defined by the LFCE. Notwithstanding, several types of conduct considered abusive under other jurisdictions may constitute relative monopolistic practices under Mexican law, as shown in questions 14 to 25. Article 56 of the LFCE defines 13 specific relative monopolistic practices. Mexican law follows an effects-based approach to identifying anticompetitive conduct as relative monopolistic practices may be deemed illegal only if the conduct is performed by an economic agent possessing substantial market power and the conduct's purpose or effect is to unduly displace other economic agents from the market, to substantially preclude their access to the market or to create exclusive advantages in favour of one or several persons. Additionally, efficiency gains and their competitive effects may be alleged to sustain the legality of a relative monopolistic practice as explained in question 13.

Unilateral conduct is never prohibited per se under Mexican law. Only horizontal restraints or collusive agreements (absolute monopolistic practices) are prohibited per se and shall always be null and void regardless of their effect on the market.

### Exploitative and exclusionary practices

- 11 | Does the concept of abuse cover both exploitative and exclusionary practices?

Only predatory and exclusionary unilateral conduct falling into a specific relative monopolistic practice definition is covered under the LFCE. A dominant firm does not violate the LFCE simply by exploiting its power and charging monopolistic prices.

### Link between dominance and abuse

- 12 | What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

In order for a relative monopolistic practice to be illegal, the conduct in question must be performed in connection with goods or services pertaining to the relevant market where the defendant possesses

substantial market power. Notwithstanding, the displacement of other economic agents (which is also a condition for the practice to be deemed illegal) may occur with respect to an adjacent but related market to the dominated market.

## Defences

### 13 | What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The main defences, usually raised to an allegation that a certain conduct constitutes a relative monopolistic practice are: an inaccurate definition of the relevant market due to the existence of close substitutes of the product or service in question; the absence of barriers to entry and, therefore, the lack of substantial market power; and that the conduct generates efficiency gains so that net contribution to consumers' welfare overcomes its anticompetitive effects.

## SPECIFIC FORMS OF ABUSE

### To what extent conduct is considered abusive

#### 14 | Rebate schemes

This conduct is covered by article 56, section VIII of the LFCE. According to this provision, granting of discounts or incentives with the requirement of not using, acquiring, selling, marketing or providing the goods or services produced, processed, distributed or marketed by a third party is a relative monopolistic practice. Thus, rebate schemes, as well as conduct referred to in questions below falling into the relative monopolistic practice concept, will only be deemed illegal if: the conduct is performed by an economic agent possessing substantial market power; the conduct's purpose or effect is to unduly displace other economic agents from the market or to substantially preclude their access to the market or to create exclusive advantages in favour of one or several persons; and the net contribution to consumers' welfare does not overcome the anticompetitive effects of the conduct.

In 2004, Miller filed a complaint before the CFC against breweries Modelo and Femsa, alleging preclusion of access to the beer sales market (through small shops) owing to economic incentives granted by the defendants in exchange for exclusive dealing. In 2006, after an appeal for reconsideration filed by Modelo, the CFC closed the case with no liability for the defendant, revoking its first decision. In 2007 the CFC decided Femsa was not liable either.

Owing to the way the aforementioned procedure was solved (a mistake in the definition of the relevant market), in 2010 Miller was able to file a similar complaint. In 2013 the CFC decided to close the procedure on condition that the investigated agents complied with specific obligations and competition protection measures.

#### 15 | Tying and bundling

According to article 56, section III of the LFCE, the sale or a transaction subject to the condition of buying, acquiring, selling or providing another different or distinguishable good or service is a relative monopolistic practice.

In 2013, the CFC fined PEMEX Refinación (a state-owned company operating in a strategic area that processes, transports and markets a wide range of products derived from crude oil) with 651.6 million Mexican pesos for tied sales in the gasoline and diesel market. The practice consisted of a condition imposed by PEMEX Refinación on gas stations to hire PEMEX Refinación's transportation services of gasoline and diesel, regardless of the conditions and the prices placed on them. This meant that gas stations were unable to transport fuel by their own

means or determine who to hire. The CFC considered this as a relative monopolistic practice. However, the Supreme Court determined that the transport of gasoline and diesel was included in the 'strategic' economic activities exemption (see question 5).

#### 16 | Exclusive dealing

According to article 56, section IV, of the LFCE, a sale, purchase, or transaction subject to the condition of not using, acquiring, selling, marketing or providing the goods or services produced, processed, distributed or marketed by a third party is a relative monopolistic practice.

In 2005, the CFC fined some Coca-Cola distributors for denying the supply of Coca-Cola products to customers refusing to accept the condition of not selling rival Big Cola products.

#### 17 | Predatory pricing

This conduct is specifically defined as a relative monopolistic practice by article 56, section VII of the LFCE. Under this provision, there is predatory pricing when there are sales at prices below their average variable cost or sales at prices below average total cost, but above their average variable cost, when it can be presumed that the losses will be recouped through future price increments.

The most important case related to this type of conduct took place in the chewing gum sales market. Cannel's sued Warner Lambert for predatory pricing, sustaining that the conduct was covered by section VII of article 10, then in force, which contained a general provision stating that any action unduly harming competition process was considered as a relative monopolistic practice. The CFC found liability, but the Supreme Court declared former section VII as an unconstitutional provision, as it lacked the specifics of the prohibited conduct, and forced the said agency to revoke its decision.

#### 18 | Price or margin squeezes

Price or margin squeezes are covered by article 56, section XIII. Under this section, there is price or margin squeezing when an economic agent reduces the margin between the access price to an essential input and the price offered for processed goods or services to the final consumer, when the essential input is used for production by the same economic agent.

On 7 April 2011, the CFC fined Telcel, the largest mobile telephony provider in Mexico, for charging its competitors higher rates for call termination services than those offered to its final customers for the mobile telephony service. It is worth mentioning that the amount of the fine, at that time around US\$936 million, is the highest that has ever been imposed by the competition authority. However, in the appeal process, Telcel offered several commitments. The CFC considered the commitments were viable and revoked its resolution. This decision was taken under the provision formerly contained in article 10, section XI of the former LFCE (in force until 6 July 2014).

#### 19 | Refusals to deal and denied access to essential facilities

Refusal to deal is explicitly covered by article 56, section V of the LFCE. Under this provision, refusing to sell, market or provide to certain persons goods or services that are usually offered to third parties is a relative monopolistic practice.

On the other hand, denied access to essential facilities is covered by article 56, section XII. Under this provision, denying, restricting or establishing discriminatory conditions in access to essential facilities is a relative monopolistic practice. Also, the LFCE contains certain provisions and a procedure for the determination of essential facilities

and essential input materials (articles 60 and 94) in order to regulate access to them. Access to essential facilities is commonly regulated in sector-specific laws (eg, the Federal Telecommunications Law obliges all operators to interconnect their networks to each other's networks).

In November 2009, the CFC fined Televisa for refusing to sell broadcasting signals to competitors in the pay-television market. The CFC highlighted that some of Televisa's broadcasting signals are an essential good for other pay-television providers as they enjoy substantially higher ratings than any other broadcasting signal. Likewise, on 26 May 2011 the CFC fined Telmex around US\$7 million (at that time) for refusing to interconnect a competitor to its fixed telecommunications network. Telmex was also forced to interconnect the competitor.

## 20 | Predatory product design or a failure to disclose new technology

This type of conduct may be covered by article 56, section XI of the LFCE, which establishes that any action increasing rivals' costs or to hinder rivals' productive processes is a relative monopolistic practice.

## 21 | Price discrimination

This conduct is explicitly covered by article 56, section X of the LFCE. According to this provision, the imposition of dissimilar selling or buying prices or conditions to buyers or sellers situated in equal conditions is a relative monopolistic practice.

## 22 | Exploitative prices or terms of supply

These practices are not covered by Mexican competition law. Abuse of dominance is always predatory or exclusionary.

## 23 | Abuse of administrative or government process

This type of conduct may be covered by article 56, section XI of the LFCE, which establishes that any action increasing rivals' costs, reducing rivals' demand or hindering rivals' productive processes is a relative monopolistic practice.

In August 2013, the CFCE closed a file in which an investigation was conducted for obstructing a competitor's access to the gas distribution market. The conduct alleged consisted, among other actions, filing motions before courts to obtain orders suspending a 'dangerous' construction and hampered the start of the competitor's operations. The CFCE decided not to sanction, because the gas company's operation were blocked due to a series of regulatory obstacles and not as a consequence of the motions filed before courts.

## 24 | Mergers and acquisitions as exclusionary practices

Mergers and acquisitions as exclusionary practices do not fall within the relative monopolistic practices concept, but may be prevented or challenged by means of the LFCE's merger control provisions.

## 25 | Other abuses

Besides those explained in questions 14 to 24, the following types of conduct are defined in article 56 of the LFCE as relative monopolistic practices (although some of them are not characterised by other jurisdictions as abuse of dominance practices but as vertical restraints): resale price maintenance, cross-subsidies, boycotts and vertical market segmentation.

## ENFORCEMENT PROCEEDINGS

### Enforcement authorities

#### 26 | Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The authorities in charge of preventing, prosecuting and sanctioning relative monopolistic practices in the administrative sphere are the CFCE and the IFT (see question 1).

In terms of articles 28, section II and 119 of the LFCE, the CFCE may request information and documents. Requests can be issued to any person presumed to have knowledge or relation to any fact under investigation.

In practice, the CFCE issues its requests on the basis that all documents are relevant and pertinent, just because it has initiated an investigation.

Moreover, it is important to mention that the authority frequently issues requirements to the agent under investigation. In addition, if the CFCE presumes that there is evidence considered necessary for the investigation in the premises of the agent under investigation, it is entitled to perform dawn raids. If the addressee is not at the corresponding place, these proceedings can be carried out with any person found at the premises, without needing to leave any kind of subpoena.

Finally, the authority can subpoena individuals in order to testify regarding the facts under investigation. There is no certainty about the implications of declaring as a witness, possible offender or as a 'person related to the investigated market'. Thus, there is no certainty about the rights that summonsed people have. There is no precedent yet about the impossibility of using the information given by deponents to incriminate themselves.

However, the Supreme Court has determined that the principle of the presumption of innocence is applicable (with some exceptions) to the administrative sanctioning procedure.

### Sanctions and remedies

#### 27 | What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The CFCE may impose fines (based mainly on percentages of income) and remedies as a result of an investigation of abuse of dominance conduct by:

- ordering a firm to cease the illegal practice;
- imposing a fine of up to the equivalent of 8 per cent of the annual income of the infringing party, during the preceding fiscal year, for the performance of a relative monopolistic practice;
- imposing a fine of up to 16.8 million Mexican pesos on the individuals engaging in the illegal conduct, acting on behalf of legal entities;
- imposing a fine of up to 15.2 million Mexican pesos on the firms or individuals that have cooperated with the infringing party; and
- disqualification from acting as an adviser, administrator, officer, manager, directive, executive, agent, representative or proxy of any company for up to five years.

In cases of recidivism, the CFCE may impose a fine up to twice the applicable amount or may order the divestiture or sale of assets, rights, ownership interests or stock in the portion as may be required for the elimination of the anticompetitive effects.

As mentioned in question 18, the highest fine ever imposed for abuse of dominance was to mobile telephony provider Telcel, and the amount of the fine was around US\$936 million at the time.

## Enforcement process

### 28 | Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The competition enforcers are empowered to impose sanctions directly. Notwithstanding, such decisions may be challenged through an amparo trial before the federal courts specialising in competition, telecommunications and broadcasting.

## Enforcement record

### 29 | What is the recent enforcement record in your jurisdiction?

Between September 2013 and the time of writing, the CFCE concluded fifteen proceedings aimed at investigating and sanctioning relative monopolistic practices. In nine of these proceedings the CFCE imposed fines on the investigated agents. Four proceedings were closed on condition that the investigated agents complied with specific obligations and competition measures. The rest of the proceedings were closed, absolving the investigated agents from responsibility. According to public information, the IFT (created in September 2013) concluded one proceeding in which a company was fined and three proceedings were closed, absolving the investigated agents from responsibility.

The average length of the procedure, from the start of the investigation to the final decision, is three years. The most recent high-profile case is the *Pemex Refinación* case (see question 15).

A recent relative monopolistic case is one that involved the Mexico City Airport and several taxi companies that had permits to operate in the premises. The conduct consisted of the imposition of dissimilar price conditions to economic agents situated in equal conditions (price discrimination). Specifically, Mexico City Airport applied differentiated rates for parking and access to the airport to all the taxi companies, except to one. The conduct had the effect of unduly displacing the excluded taxi company and the creation of exclusive advantages in favour of the other companies. The investigation was initiated on October 2013 and the decision was issued on September 2016. The CFCE imposed a fine of 63 million Mexican pesos on Mexico City Airport.

## Contractual consequences

### 30 | Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

There are no direct consequences for the validity of contracts entered into by dominant companies. However, as the CFCE may order the correction or cessation of a relative monopolistic practice as a sanction, a resolution stating that this kind of illegal conduct has taken place could result in the order to modify some terms of contracts.

## Private enforcement

### 31 | To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Article 67 of the LFCE entitles any third party to file a complaint before the CFCE against any economic agent performing relative monopolistic practices. The CFCE may order the cessation of the practice, which could imply an obligation on the dominant firm to grant access, supply goods or services, conclude a contract, invalidate a provision or to perform whatever action is required to cease the illegal conduct.



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## Damages

### 32 | Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Damages claims for relative monopolistic practices have not been frequent in Mexico, as a decision from the competition authority judging a party is responsible (as a legally settled matter) is necessary for initiating a process on the matter. In fact, the end of 2016 saw the first ever damages claim filed before Mexican courts, which was dismissed for procedural aspects. However, this damages claim derives from a cartel conduct case. Thus, private antitrust tort practice is still under development.

Damages claims can be lodged by both individuals or through a class action. The latter can be lodged by the CFCE, by a group of no less than 30 members, by not-for-profit civil organisations whose purpose is the defence of rights and interest in antitrust matters and by the Attorney General of Mexico. The balance of the advantages and disadvantages of class actions is still pending.

Federal courts specialising in competition, telecommunications and broadcasting have jurisdiction over individual and collective damages claims.

## Appeals

### 33 | To what court may authority decisions finding an abuse be appealed?

The decisions of the CFCE and IFT may be challenged through an amparo trial before the federal courts specialising in competition, telecommunications and broadcasting. This trial is aimed to revoke unconstitutional or illegal decisions of any kind of authorities.

## UNILATERAL CONDUCT

### Unilateral conduct by non-dominant firms

#### 34 | Are there any rules applying to the unilateral conduct of non-dominant firms?

There are no rules applying to unilateral conduct performed by non-dominant firms.

**UPDATE AND TRENDS****Forthcoming changes**

35 | Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

On October 2018, the IFT released for public consultation the project of modifications to its regulatory provisions. The proposed modification describes in detail the procedure to get the benefit of exemption or reduction of the fines in investigations of relative monopolistic practices and illegal concentrations, for the telecommunication and broadcasting sectors. The final version of the regulatory provisions was published in February 2019.

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