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COELUM

The Intervention of the Federal Economic
Competition Commission (COFEC) in the Mexican
Aviation Industry.

By Paulina Nava



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In the current Mexican airport scenario, unfair competition has emerged due to the introduction of the “allocation” (*asignación*) figure¹, as a result of amendments to the Civil Aviation Law and the Airports Law, published on May 3, 2023, in the Federal Official Gazette (DOF)². This figure allows any state-owned company to participate in the administration of airport facilities and air transportation services, which generates disparities between allocated airports and those operating under concession³. For example, the duties to be paid by airports in accordance with the provisions of the Federal Law of Duties are determined as follows: the entities holding an airport allocation must cover only 5% of their gross revenues, including complementary and commercial services, while the concessionaires must comply with 9% of their gross revenues⁴.

“This situation also poses significant obstacles for the Mexican aviation industry by creating competitive advantages for state-owned airlines over private concessionaires and permit holders.”

This situation also poses significant obstacles for the Mexican aviation industry by creating competitive advantages for state-owned airlines over private concessionaires and permit holders. In this context, private airlines face challenges and financial burdens that their state-owned counterparts do not, due to different regulations and obligations. These disparities hinder the ability of private airlines to compete on a level playing field. The state-owned airline benefits from lower operating costs, which allows it to offer more competitive fares to the public. As a result, private airlines are forced to reduce their profit margins, limit their expansion or even abandon certain routes. This not only decreases the diversity and availability of flight options for consumers, but also undermines the principles of fair competition.

CURRENT ALLOCATIONS

So far, 20 airport allocations have been granted, herein listed for reference purposes:

- 12 airport allocations have been granted to the Ministry of National Defense (SEDENA) through the Olmeca-Maya-Mexica Airport, Railway, and Auxiliary Services Group (“Grupo Aeroportuario, Ferroviario y de Servicios Auxiliares y Conexos Olmeca-Maya-Mexica, S.A. de C.V.” or “GAFSACOMM”)⁵; and,

- 8 airport allocations have been granted to the Ministry of the Navy (SEMAR) through the Mexico City Airport Group (“Grupo Aeroportuario de la Ciudad de México” or “GACM”) and the Tourist Airport Group of Mexico (“Grupo Aeroportuario Turístico de México”)⁶.

1.- According to the Article 10 Bis of the Civil Aviation Law, allocations may be granted as follows: “The head of the Ministry of Infrastructure, Communications and Transportation may grant allocation titles to the State-owned entities of the Federal Public Administration to provide public national air transportation service...”

2.- Available in the following link: https://www.dof.gob.mx/nota_detalle.php?codigo=5687750&fecha=03/05/2023#gsc.tab=0

3.- According to Urzúa Macías Efraín, *Derecho Administrativo*, Universidad de Guadalajara, Edit. Universitaria, Guadalajara 1971, Pág 50. The concession definition is: “Through the concession act, the government grants the right to a private individual to manage a public service or state asset, subject to certain requirements and conditions”

4.- According to the articles 220 and 220-A of the Federal Law of Rights, available in the following link: <https://www.diputados.gob.mx/LeyesBiblio/pdf/LFD.pdf>

5.- GAFSACOMM airports are located at: Nogales (NOG), Nuevo Laredo (NLD), Cd. Victoria (CVM), Tamián (TSL), Uruapan (UPN), Puebla (PBC), Campeche (CPE), Cd. Ixtepec (IZT), Palenque (PQM), Chetumal (CTM), Tulum (TQO) and AIFA (NLU). According to the following links:

<https://a21.com.mx/dof>

<https://grupoolmecamayamexica.com.mx/>

6.- GACM airports are located at: Mexico City (AICM), Loreto (LTO), Matamoros (MAM), Sonora (GYM), Colima (CLQ), Ciudad del Carmen (CME) and Ciudad Obregón (CEN).

According to the following link:

<https://www.gacm.gob.mx/>

GATM airport is located at Riviera Nayarit with IATA code: TPQ. According to the following link: <https://www.gatm.gob.mx/>

Additionally, as mentioned above, an allocation was granted to a state-owned airline, "Aerolínea del Estado Mexicano, S.A. de C.V.", known as Mexicana de Aviación, which recently merged with GAFSACOMM⁷.

THE INTERVENTION OF THE FEDERAL ECONOMIC COMPETITION COMMISSION (COFECE)

The COFECE is an autonomous body of the Mexican State whose objective is to protect and guarantee fair competition and concurrence in the markets. Its faculties are established in the Federal Antitrust Law⁸, aimed at acting effectively to prevent and correct all anti-competitive behavior.

With the president's legislative initiative on the inclusion of the allocation figure to state-owned companies for an indefinite period, COFECE expressed its opinion in March 2023, mentioning the following as some of the risks to competition that could be generated:

"i) Undue advantage in the provision of airport services. The company that owns the airport could assign to its competitors more distant waiting rooms, less office space, distant counters for passenger check-in, reserve slots with higher demand for its own uses, among others.

ii) Margin squeeze. The company that owns the airport could increase or introduce new tariffs for the use of the airport, which could lead competitors in the air transport market to increase the price of air transport market to increase the price of their tickets or reduce their profit margins.

iii) Cross-subsidies. With the charges it receives for the use of the infrastructure, the airport company can reduce its air fares in order to put pressure on competitors, reduce its profits and displace them from the market.

iv) Refusal of access. The airport manager could explicitly or constructively deny access to the infrastructure..."

"This concentration may be reflected in the fact that is currently in a difficult situation since its progress and growth have been limited, showing a clear lack of planning and strategic development, which could be due to several factors, including inefficient management, the influence of bureaucratic decisions and a possible lack of investment in infrastructure and trained personnel."

Additionally, in this opinion, COFECE expressed its concern over the proposed differential treatment of concessionaires and permit holders that operate air transportation services. Particularly mentioning the problem that arises with the indefinite duration of allocations to state-owned companies, which may only be rescinded or revoked if the government presents a duly justified cause, which clearly represents the concentration of functions and powers.

Furthermore, it was required that greater competitive neutrality should be ensured among market participants, as public enterprises would be in an advantageous position. Since this initial opinion was not considered before the approval of these amendments to the law, questions have arisen about the transparency and fairness in the process of airport allocations and the operation of state-owned airlines.

This situation also generates concern, as both SEDENA and SEMAR are national military service institutions. In the article "Militarization in Mexico" by Integralia, published in September 2022, it is noted that "the military lacks the competence to

7.- The resolution is available at: https://www.dof.gob.mx/nota_detalle.php?codigo=5721208&fecha=25/03/2024#gsc.tab=0

8.- Law available in the following link: https://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE_200521.pdf

attend to civilian affairs; rather, the military bodies are trained to eliminate threats to national security and, therefore, are more prone to commit abuses of force and violations of rights...”⁹

The centralization or concentration of control in the hands of the government can lead to bureaucratic decisions that negatively impact competition, as well as a lack of clear separation between administrative and operational functions. Previously, this concentration was regulated and limited by Article 29 of the Airports Law, which prohibited any group of air transport service concessionaires or permit holders from directly or indirectly acquiring control of an airport concessionaire company. However, with the appearance of the allocation figure, this article was modified and now establishes that these restrictions do not apply to state-owned entities, authorizing and encouraging the government to have power over both the airports and the airline¹⁰.

This concentration may be reflected in the fact that is currently in a difficult situation since its progress and growth have been limited, showing a clear lack of planning and strategic development, which could be due to several factors, including inefficient management, the influence of bureaucratic decisions and a possible lack of investment in infrastructure and trained personnel.

“Currently, COFECE continues to closely monitor this situation, since as a supervisory body it is crucial to ensure that operations are carried out in a fair and efficient manner, maintaining competitive neutrality, and avoiding monopolistic practices.”

After an investigation and finding anticompetitive practices, COFECE issues a binding resolution, which must be complied with by the company. If the company does not comply with these resolutions, a fine will be imposed. Depending on the type, nature and magnitude of the situation, other authorities may be requested to intervene to ensure compliance. In serious cases, non-compliance may lead to additional legal proceedings and intervention by international regulators.

Currently, COFECE continues to closely monitor this situation, since as a supervisory body it is crucial to ensure that operations are carried out in a fair and efficient manner, maintaining competitive neutrality, and avoiding monopolistic practices. Therefore, SEDENA and SEMAR, through the previously mentioned assigned groups and allocations, must maintain free competition and separate their military character from the administration of both airports and airline and, in case any opinion is initiated in this regard, set the bureaucracy behind them, assuming their responsibilities and complying with what will be required.

9.- Available in the following link: <https://integralia.com.mx/web/reporte-especial-la-militarizacion-en-mexico-hacia-la-consolidacion-de-una-politica-de-estado-2006-2022/>

10.- <https://www.diputados.gob.mx/LeyesBiblio/pdf/LAero.pdf>

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Paulina is an associate in the regulatory area of the firm. Her practice focuses on the fulfillment of the obligations of international airlines with participation in Mexico before governmental entities. In addition, Paulina has experience in the transactional area, assisting in the process of transactions such as leases, sales and acquisitions, financing, among others.

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