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Competition Policy in Mexico

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Competition policy in Mexico started in 1993 when the Federal Law of Economic Competition entered into force and the Federal Competition Commission (hereinafter Commission or CFC, for its initials in Spanish) was created as the agency responsible for its enforcement. During its fourteen years of activity, the CFC has won key battles before the courts that have paved the path for an effective competition policy based on sound economic analysis and aimed at enhancing the efficient functioning of markets. It has achieved notable advances in competition advocacy, merger control, and cartel and unilateral conduct enforcement. However, the CFC faces significant challenges from cartel activity, prevailing regulatory restrictions on competition, and exclusionary practices undertaken by some of the most powerful corporations in Mexico. Its ability to deal with these challenges is constrained by legal limits to the levels of fines that are far below international standards. It also faces a judicial system that ordinarily reviews competition decisions at the request of respondents, but lacks the specialized economic expertise needed to consider substantive competition matters in their resolutions. There is an urgent need for the CFC to focus its resources on effectively prosecuting the most damaging anticompetitive practices and to strengthen its efforts to develop a competition culture, especially within the Congress, regulators, and other government branches.

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I. THE OBJECTIVES OF COMPETITION POLICY

The Constitution has prohibited monopolies since 1857, but the enforcement of this prohibition was only introduced in 1993 when the Federal Law of Economic Competition (hereinafter FLEC, competition law, or law) entered into force. According to Article 2 of the FLEC, the objective of this law is to "protect the process of competition and free market access by preventing and eliminating monopolies, monopolistic practices and other restrictions to the efficient functioning of markets."

Economic efficiency is the central objective of the law. This objective was strengthened by amendments to the FLEC in 2006 (the 2006 amendments), which explicitly introduced the efficiency defense for unilateral conduct and mergers. That is, otherwise anticompetitive practices or mergers may be allowed in view of the efficiency gains they bring about.

For the purpose of law enforcement, economic efficiency is interpreted as the maximization of consumer welfare. This interpretation was clarified by the 2006 amendments, which specified that, in determining whether a unilateral conduct is illegal, the CFC must evaluate the pro-competitive efficiency gains it produces, as well as its net effect on consumer welfare.[1] A similar interpretation applies to mergers: Article 16 of the Regulation to the FLEC (Regulations) deems a merger as efficiency-enhancing if it increases consumer welfare.

Article 5 of the law exempts intellectual property rights (IPRs) from the monopoly provision, thus implicitly allowing monopolistic exploitation of IPRs for the

[1] In both mergers and unilateral conduct, the burden of proof regarding efficiency gains is on the parties.

sake of promoting long-run innovation. This exception, however, does not include leveraging IPRs to exclude competitors in related markets.

In 1996, the Supreme Court of Justice (SCJ) validated these objectives of the FLEC when it determined that "our constitutional system has been focused on the prohibition … of all conduct that tends to impede free access to markets … to the extent that restrictions to free competition naturally imply perturbation in a product's price, quality and commercialization." It also stated that the Constitution does not "prohibit anticompetitive acts based on the beneficial consequences one of the parties may derive, but in attention to the damage they cause to the protected legal right, that is, competition and free access to markets in which society is interested."[2]

II. INSTITUTIONAL DESIGN OF THE COMPETITION AGENCY

The CFC is a decentralized administrative entity of the Ministry of the Economy. It has operational and technical autonomy to investigate, adjudicate, and sanction anticompetitive conduct and mergers. In Mexico, there is no direct private right of action: all complaints about potential violations to the competition law must go through the CFC, and offended parties can claim damages before the judicial system only after the CFC finds a violation.

The autonomy of the CFC has been essential for a proper implementation of competition policy. This autonomy is based on two key pillars. First, cases are resolved collectively by the Chairman of the CFC and four other Commissioners, who are named for a period of 10 years and cannot be removed, except for grave reasons unrelated to

[2] Supreme Court of Justice (SCJ), Amparo en revisión 2617/96 (1996), at 323.

their resolutions. Second, the budgeting mechanism prevents other government branches from using budgetary constraints to retaliate against CFC resolutions.

The Commission concentrates investigative and adjudicative powers. This concentration has facilitated coordination and synergies between these two tasks. It has also allowed the development of a staff specialized in competition cases. While concentrating investigative and adjudicative powers in one agency may be criticized for introducing potential conflicts of interests and limiting procedural transparency and accountability, these risks are minimized by the parties' ability to appeal CFC decisions before the judicial system.

Parties may challenge CFC decisions before the judicial system by initiating one of two types of proceedings:

1) an "amparo suit", which may be filed before a federal district court against unconstitutional acts by the CFC; or
2) an appeal in the Court of Fiscal and Administrative Justice to challenge a CFC resolution imposing a fine.

Decisions by district or fiscal courts can be appealed before a second instance tribunal. Subsequent review of tribunal decisions before the SCJ is available only for rulings on statutory constitutionality or on issues involving conflicts between appellate court decisions.

Introducing a direct private right of action is unlikely, at least until the judicial system develops the specialized economic expertise required to adequately adjudicate competition cases. This affects the CFC's ability to focus resources on cases that have the

most impact on competition and consumer welfare. The CFC is constantly under pressure to investigate every anticompetitive conduct complaint even if the complaint is not very relevant or only meets minimal formal requirements.

III. CONTENT OF THE COMPETITION LAW

The FLEC prohibits practices by which monopoly power might be attained or strengthened. The law classifies monopolistic practices as either absolute (horizontal agreements or cartels) or relative (unilateral conduct). An investigation of monopolistic practice violations may result in administrative sanctions, including corrective conduct orders or fines. Also, the CFC may refer violations of monopolistic practices that severely affect a market for necessary goods to the Public Prosecutor for consideration of criminal charges.

A. Cartels

Article 9 of the law states a per se prohibition on four categories of agreements among competitors, which exactly match those identified as "hard core cartels", namely: price-fixing, output restriction, market division, and bid-rigging.

Firms participating in a cartel may be sanctioned with a maximum fine of US$7.2 million and individuals may be fined up to US$145,000. Recidivist firms may be sanctioned with double fines or 10 percent of total revenue or assets, whichever amount is larger.[3]

The 2006 amendments introduced a leniency program for cartel investigations. Under this program, the first agent to provide sufficient evidence to establish liability is

[3] Fines are established in terms of the minimum wage in Mexico City, but, for the sake of simplicity, this document presents their equivalence in U.S. dollars.

subject to a minimum fine, while other agents that proffer additional evidence to the CFC investigation may be granted fine reductions of up to 50 percent.

Before the mid 1980s, regulated prices were often set by agreement among members of trade associations under the supervision of the Ministry of Economy. During the early years of the CFC, cartels facilitated by trade associations were found frequently because of the role they were accustomed to playing during the price-control era. The incidence of this type of cases decreased after 1998 when the Regulations clarified that such activities by trade associations would be considered circumstantial evidence in cartel investigations.

Another recurrent conduct in the early years of the CFC involved small firms unaware of the existence of the law. Most of these cases were proven with direct evidence because cartel members actually entered into written agreements and made them public. The CFC declared these agreements void and imposed symbolic sanctions.

The CFC also commonly found local authorities resolving disputes among competitors, mostly small producers of tortilla, by getting them to negotiate a division of geographical markets or to agree on prices. Since the CFC is not empowered to resolve against acts undertaken by local authorities, it issued non-binding recommendations that local governments suspend their involvement in these activities. In many instances, local authorities followed the CFC's recommendations.

Bid-rigging cases are also prominent. The CFC has investigated bid-rigging in auctions for medical equipment and in the sale of radiographic developing chemicals to medical institutions. Other price-fixing investigations have involved milk, surgical

sutures, beer, and airline ticket distribution. Additionally, the CFC has also brought follow-on actions against the Mexican subsidiaries of companies involved in international lysine and citric acid cartels.

Nowadays, the CFC investigates more sophisticated cartels apparently founded on secret commitments. Some of the current investigations involve the market for construction materials and real estate associations, as well as bid-rigging in the pharmaceuticals market.

B. Unilateral Conduct

Anticompetitive unilateral conduct is subject to a substantial market power screening and a demonstration of intended, actual, or potential harm to competition. The preamble of Article 10 of the FLEC provides a generic definition of relative monopolistic practices as those "whose aim or effect is or could be to improperly displace other agents from the market, substantially hinder their access or that establish exclusive advantages in favor of one or several entities or individuals." It then identifies eleven specific types of conduct that construe such practices: (i) vertical market division; (ii) resale price maintenance; (iii) tied sales and bundling; (iv) exclusive dealing; (v) refusal to deal; (vi) collusive boycott; (vii) predatory pricing; (viii) exclusive dealing in exchange for special discounts; (ix) cross-subsidization; (x) price discrimination; and (xi) raising rivals' costs, hindering their production process, or reducing their demand.

A finding of liability requires the CFC to demonstrate the following elements: i) the alleged violator carried out one of the specific practices defined; ii) the conduct concerns goods or services in the relevant market; iii) determination that the alleged

violator has substantial power (dominance) in the relevant market; iv) it has the intent or effect of displacing agents, hindering access, or establishing an exclusive advantage.

The alleged responsible party may present an efficiency defense, in which case the CFC must evaluate the claimed efficiency gains and assess the net effect of the conduct on consumer welfare.

The CFC may impose a maximum fine of US$4.3 million on firms for unlawful relative monopolistic practices and a fine of US$145,000 on individuals. Recidivist firms may be sanctioned with double fines or 10 percent of total revenue or assets, whichever amount is larger.

Between 1993 and 2007, the CFC sanctioned 36 unilateral conduct cases. The most common anticompetitive practices were: i) refusal to deal; and ii) conduct characterized as increasing rivals' costs, reducing their demand, or hindering the productive process. Other practices sanctioned included: exclusive provisions; boycotts; discrimination; exclusive distribution tied sales; predatory pricing; volume discounts granted in exchange for exclusivities; and cross-subsidization.

C. Merger Control

Article 16 of the law prohibits mergers for which the purpose or intent is to reduce, harm, or hinder competition and free market access. Article 17 identifies the following indications of an anticompetitive merger:

i. it confers the merged entity substantial market power;

ii. it is intended to substantially restrict competitors' access to the market (foreclosure); and

iii. it has the purpose or effect of substantially facilitating unlawful monopolistic conduct (coordinated effects).

The merging parties may present an efficiency defense. Article 16 of the Regulations deems a merger pro-competitive and efficiency-enhancing whenever the parties show that the increased consumer welfare it generates permanently outweighs its anticompetitive effects.

Article 20 of the law establishes pre-merger notification obligation for operations exceeding certain thresholds defined in terms of the size of the transaction, percentage of shares involved, and absolute size of the merging parties (measured in assets or annual sales). Article 21bis provides for a fast-track procedure for mergers that clearly raise no competitive concerns.

The Commission is empowered to sanction an unlawful merger by ordering partial or full divestiture, as well as by imposing conduct relief and a fine of up to US$4.3 million.

The CFC has blocked or conditioned mergers only when they could clearly harm competition. The CFC has blocked less than one percent of all mergers reviewed. Among the most significant transactions that the CFC has rejected are:

i. Coca Cola-Cadbury (further detailed in Section IV.E);

ii. Televisa-Radio Acir, a merger between the largest television corporation and one of the largest radio conglomerates;

iii. the divestment of CINTRA, the holding company of the two major domestic airlines in which the government held a controlling interest, to a single purchaser; and

iv. the combination of two of the three regional railroads which the Mexican railway system previously had divided for privatization (final decision is pending in the judicial system).

D. Privatization Proceedings, Concessions, and Permits

The law, Article 24, Section XVI, empowers the CFC to include pro-competitive measures in privatization proceedings and in proceedings undertaken by federal entities to allocate concessions and permits for private parties to render public services. Similarly, sector regulations in telecoms, natural gas, and railroads require a favorable CFC opinion to grant concessions or permits to economic agents.

The CFC has been an active participant in designing the processes used for privatizations and for allocating concessions and permits. Some of the most relevant sectors in this regard include railroads, ports, natural gas pipelines, allocation of radio electric spectrum for mobile telephone services, LP distribution, fixed satellite services, and so forth.

E. Market Power Determinations

Most regulatory schemes in the transportation, telecommunications, energy, and financial sectors empower the corresponding regulator to impose price regulation, access controls, and other requirements on sector participants. However, sector regulators can exercise these powers only after the CFC finds there to be an absence of effective

competition in the relevant market (or, in telecommunications, the presence of a dominant player). If, subsequently, the CFC determines that effective competition has been restored, the sector regulator would have to remove such controls.

Likewise, before the federal executive can impose price controls on goods considered necessary for the domestic economy or for popular consumption, the CFC must determine that a lack of competitive conditions exists for those goods.

The CFC has issued resolutions determining the absence of effective competition in several areas: ancillary airport services, domestic air passenger transportation, port services, and LP gas distribution. It also found that Telmex, the largest fixed telephony operator, possessed substantial market power in several markets. This resolution, however, was revoked by the courts on procedural grounds.

Currently, the CFC is investigating the presence (or absence) of substantial power in several fixed and mobile telephony markets. It is also about to resolve whether effective competition exists in LP gas transportation and distribution.

F. Competition Advocacy

The competition law vests the CFC with advocacy functions. Since the 2006 amendments, the agency is empowered to issue binding opinions on proposed changes to federal programs and policies and on the competitive implications of new laws, rules, and government acts proposed by federal entities, whenever these may entail anticompetitive effects. The President of Mexico is entitled to object to this opinion, but publication of both decisions is mandatory.

The CFC is also empowered to issue non-binding opinions on competition aspects of both proposed and existing laws and regulations. These opinions must also be published.

Finally, the CFC is entitled to establish a coordination mechanism with federal and local authorities to implement its enforcement actions and to promote the observance of competition principles in the acts of these authorities. The CFC may also undertake inter-agency agreements on competition policy and regulatory matters.

The CFC has an active agenda in proposing, reviewing, and revising sector regulations. For example, it has issued several public opinions on specific economic sectors identifying competition concerns associated with regulations and recommending reforms to address them. These opinions have been typically issued together with a detailed report on the competition conditions prevailing in the corresponding markets. Between 2005 and 2007, the CFC issued opinions aimed at:

i. facilitating technological convergence and promoting a more competitive environment in telecommunications;
ii. enhancing efficiency and competition in the private pension system;
iii. developing a pro-competitive regulatory framework to facilitate access to audiovisual content;
iv. promoting a more competitive structure of the retail banking system; and
v. minimizing regulatory inefficiencies in the supply of airport services.

Several of the recommendations regarding private pension funds and retail banking have already been introduced in the corresponding laws and regulations. In the

case of technological converge in telecoms and access to video content, although the recommendations have not been fully implemented yet, they have set the regulatory agenda and government actions to implement them and are expected in the near future. In the case of airports, none of the suggested measures have been implemented.

IV. REPRESENTATIVE CASES

This section summarizes key antitrust cases resolved by the CFC and reviewed by the courts, which have addressed the validity of the use of economic concepts and principles in enforcing the competition law. It also presents some illustrative competition advocacy initiatives undertaken by the CFC.

A. Warner Lambert (merger)

In 1996, the CFC investigated the acquisition of assets for the production of tooth brushes undertaken by Warner Lambert.[4] Warner Lambert filed an amparo proceeding before the federal courts challenging the constitutionality of the FLEC because it contained no formal definition of several economic concepts: relevant market, substitutes, substantially related goods or services, market share, entry barriers, recent economic behavior of an economic agent, and substantial market power.

In May 2002, the SCJ determined these concepts were clear within the context of the FLEC and that the legislator intended to grant them the meaning they had in the economic discipline.[5] The court concluded these concepts were common in the economic discipline and recognized the existence of analogous doctrine in other jurisdictions.

[4] Federal Competition Commission, File IO-18-96 (1996).

[5] SCJ, *supra* note 2, at 273-325.

B. Coca-Cola/Cadbury (merger)

In 1999, the CFC reviewed the proposed international acquisition by The Coca-Cola Company of several beverage brands owned by Cadbury Schweppes Plc. The Commission rejected the merger. It defined carbonated beverages as the relevant market for this merger and based its assessment of market power mainly on high market concentration and the existence of barriers to entry (advertising, distribution channels, and commercial practices such as exclusive dealing).

Coca-Cola and Cadbury filed an amparo proceeding against the CFC's resolution on two main grounds:

i. that the relevant market should have included non-carbonated beverages; and

ii. that the law did not properly define the concept of merger.

Nevertheless, the court upheld the CFC's decision because it determined that there was no close substitution between carbonated and non-carbonated beverages and that the terms in the law should not only be interpreted within the legal context, but also in consideration of the meaning they had in the economic discipline.

C. Purchase of X-Ray Material by the Health Sector (bid-rigging)[6]

In 2000, Reliable de México filed a complaint against Kodak Mexicana, SA de CV (Kodak), GPP Mexicana, SA de CV (GPP), and Juama, SA de CV (Juama) for alleged collusion in public auctions called by public health care institutions for the purchase of x-ray material. Together these firms accounted for 93 percent of the market for x-ray film.

[6] Federal Competition Commission, Files DE-57-2000 (2000), RA-81-2002 (2002) and RA-82-2002 (2002).

The CFC analyzed 35 public auctions from 1997 to 2000, and found instances of collusion in 21 of them. In eleven auctions, the defendants offered identical tenders and obtained equal shares of contracts. Furthermore, the defendants bid identical prices for several product codes whenever two or three of them participated in the auction. The defendants contended that reference prices issued by the bid-takers caused their tenders to be similar, but they were unable to prove this assertion.

The CFC found Juama and GPP responsible for violating the FLEC, ordered suspension of the practice, and fined both of them. The proceeding against Kodak was settled early based on commitments proposed by this firm and involved the payment of a fine.

GPP challenged this decision before the courts alleging, among other things, that the CFC lacked evidence to prove the existence of an illegal agreement. However, a court of second instance confirmed the CFC's decision on the grounds that the CFC based its decision not only on circumstantial evidence of price similarity, but also on the following facts: the bidders hired the same advisor, who was a member of the board of directors of an association of radiological materials; the three firms offered identical arguments to challenge auction proceedings; and the bid price levels clearly showed a relation with the participation or absence of non-cartelized competitors in the auctions.[7] The tribunal validated the CFC arguments that circumstantial evidence construes proof and that the CFC is empowered to discretionally grant it probative value.

[7] Tenth Collegiate Tribunal on Administrative Matters for the First Circuit, Amparo en revisión RA 65/2005 (2005).

D. Warner Lambert (predatory pricing)

One of the most transcendental SCJ resolutions regarding unilateral conduct is its 2003 ruling in the *Warner Lambert* case,[8] where it declared Article 10, Section VII of the FLEC unconstitutional. This ruling explains an essential element of the Mexican legal system that requires legal statues to clearly set out unlawful conduct.

In November 1997, the CFC found Warner Lambert responsible for a violation of the predatory pricing provision originally established in Article 7 of the Regulations to the FLEC,[9] but based on Article 10, Section VII of the law, which constituted a catch-all provision for unilateral conduct: "in general, all the actions that unduly damage or impair the process of competition."

Warner Lambert appealed the CFC's decision before the courts. In November 2003, the SCJ determined that the provision was unconstitutional because it failed to establish the necessary parameters to determine the type of infringement that merited the corresponding sanction. In doing so, the court endowed the CFC with absolute discretion to determine whether a given conduct construes an infringement and, thereby, generated legal uncertainty. Article 7 of the Regulations was based on this catch-all provision, and it was also considered unconstitutional.

Since the CFC's power to investigate and sanction several types of unilateral conducts was based on Article 7 of the Regulations, the CFC lobbied intensively to replace the catch-all provision for the specific practices foreseen in the Regulations, namely predatory pricing, discrimination, cross-subsidies, exclusive dealing in exchange

[8] Supreme Court of Justice, Amparo en revisión 2589/96 (1996).

[9] Fourth District Judge on Administrative Matters, JA 356/99 (1999).

for special discounts, and raising rivals' costs or reducing their demand. These changes were incorporated in the 2006 amendments to the FLEC.

E. Coca-Cola (exclusivity contracts)

In 2000, following a complaint filed by Pepsi-Cola Company and its subsidiaries (PCM), the CFC investigated Coca-Cola firms (The Coca-Cola Company and the Coca-Cola Export Corporation, TCCEC) and 89 bottling subsidiaries acting jointly as an economic group for the alleged commission of unlawful relative monopolistic practices in the form of exclusive dealing, loyalty discounts, and raising rivals' costs.[10] In June 2005, the CFC found the Coca-Cola Group (CCG) in violation of the exclusive dealing provision, and imposed the maximum allowed fine on each member firm in the group.

The CFC decision established that the CCG undertook exclusivity contracts prohibited in the law. These contracts obliged retailers to display only products of the Coca-Cola brand and to participate in advertising campaigns. Retailers were also banned from selling and advertising products from competitors. In return, bottlers paid for exclusivity rights, granted discounts on products of the Coca-Cola brands, covered some advertising costs, provided vending machines to display Coca-Cola products exclusively, and granted volume rewards. Additionally, retailers that breached the contracts were subject to penalties.

The CFC's market power determination was based on the following elements: the relative market shares (CCG had a market share of 72.1 percent of the domestic market for carbonated drinks, while PCM, the second largest competitor, had 18 percent); a high

[10] Federal Competition Commission, File DE-06-2000 (2000).

degree of vertical integration; and high barriers to entry associated with investments in distribution channels, trademark, and advertising, and the use commercial practices such as exclusivity contracts.

The members of the CCG presented an efficiency defense. They argued that exclusivity contracts expanded sales, protected investments, and precluded free-riding. The CFC deemed exclusivities related to refrigerators owned by CCG pro-competitive, but dismissed the defense regarding other kinds of incentives offered to convenience and grocery stores. It also recognized efficiencies stemming from exclusivities regarding restaurants, provided that their duration was restricted.

Finally, the CFC determined that the purpose of the practice was to unlawfully displace competitors of CCG. There was evidence that the CCG increased its share by using this practice.

The members of CCG appealed the decision before the judicial system. So far the courts have reached a definite resolution only in the case of TCCEC, where they upheld the CFC decision. The following were the main elements of the court's resolution:[11]

i. the CCG existed given the economic, financial, commercial, and business links of the sanctioned firms, even though they were legally incorporated as independent firms;

ii. TCCEC violated the law since it heads the economic group that conceived the illegal exclusivity arrangements;

[11] Thirteenth Collegiate Tribunal on Administrative Matters, Decision on RA 469/2006 (2006), at 915-1002.

iii. the domestic market for carbonated beverages was correctly defined as the relevant market;

iv. the market power assessment based on the concept of CCG was adequate;

v. the fines imposed by the CFC were not excessive because they were based on the gravity of the case and the firm's capacity to pay; and

vi. it was evident that the objective of the exclusivity contracts was to exclude competitors.

V. SHORTCOMINGS AND CHALLENGES

After fourteen years of implementation, competition policy in Mexico has progressed substantially. However, more needs to be done before competition policy fully promotes economic efficiency and consumer welfare. Some of the challenges facing the CFC and the actions it may take to overcome them are described in this section.

A. Level of Fines

The maximum levels of fines are far below international standards and have clearly been insufficient to deter anticompetitive conduct by large corporations. For example, in the case of unilateral conduct, the maximum level of fines for a first time violation represents 0.115 percent or less of the annual sales of the ten largest corporations in Mexico.[12] These ten firms hold the largest market shares in telecoms, beverages, cement, and transportation markets, which are among the sectors where the CFC has sanctioned unilateral conducts most frequently.

[12] In cartel cases, this figure increases to 0.19 percent.

The effective enforcement of competition law requires a substantial increase in these fines. However, it seems that large corporations have been effective in lobbying against several initiatives aimed at this goal.

B. Competition Advocacy

Competition is not yet the normal way of doing business in Mexico. Obtaining and keeping privileges granted by the state is still common. Competition implies the loss of these privileges, which creates opposition that can only be offset by making the public aware of the benefits of competition. Unfortunately, the broader public is still unaware of these benefits, especially because competition is absent in fundamental aspects of day-to-day life: health care, education, electricity, oil, and so forth. Therefore, the CFC must strengthen its advocacy activities and continue its efforts to make competition policy relevant to the broader public.

A similar challenge is to convert competition policy into state policy. Economic and industry-specific regulations are not alternatives to competition policies; rather, they are complementary tools for promoting market efficiency. In Mexico, many policymakers still consider competition and regulatory policies rivals. This attitude results in barriers to entry and subsidies that favor domestic enterprises and appear to enhance the competitiveness of Mexican firms.

The CFC has issued several non-binding opinions to promote pro-competitive regulations. Although CFC opinions are not always followed, they are an effective instrument for advocating for a pro-competitive regulatory framework. The 2006 amendments to the competition law empowered the CFC to issue binding opinions on

projected secondary regulations and administrative acts. So far, the CFC has not issued any opinions based on this provision. However, if used selectively in extreme cases where competition advocacy fails, binding opinions could become a useful tool to dissuade the introduction of regulations that unnecessarily restrict competition.

C. Litigation

The effectiveness of competition law enforcement has been stymied by litigation as a means of delaying resolutions. The CFC dedicates significant effort and resources to defending its resolutions before the judiciary system. Although amparo actions constitute a crucial instrument to protect the right of individuals, the high number of actions brought before the courts has become a serious problem in promoting competition: they consume a substantial portion of the CFC's resources and, more importantly, delay justice and leave the public interest unprotected. Companies committing monopolistic practices continue to reap the benefits of their conduct while cases are litigated, and so have an incentive to initiate proceedings and delay the final resolutions, even if they expect to eventually lose the case.

Another important problem is associated with the lack of specialized economic expertise in the judicial system. After fourteen years of competition policy in Mexico, district courts still have not developed the expertise required to properly evaluate substantive competition issues and are uncomfortable with a conceptual statute such as the LFCE. As a result, they tend to rule on procedural issues without considering the substantive merits of the case.

This situation is especially serious in unilateral conduct cases. Between 1993 and 2007, the CFC sanctioned 36 cases, the majority of which were appealed before the judicial system. The courts took an average of 2.4 years to reach a definitive decision and almost never delved into the substantial matters.

These problems are difficult to address since the right to judicial review is provided in the constitution. Fortunately, the Supreme Court of Justice has resolved the constitutionality of the great majority of the FLEC's provisions, as well as important procedural issues, by resolving conflicts between lower court decisions. This may reduce the number of amparo proceedings in the future.

The CFC is implementing diverse strategies aimed at developing the economic expertise within the judicial system and is advocating for the establishment of a specialized amparo court with economic expertise to resolve appeals related to cases from the CFC and other regulators that deal with economic concepts.

The CFC also needs to strengthen its investigative and adjudicative procedures. This would minimize the risk of courts revoking resolutions on procedural grounds and reduce the incentives of the parties to litigate on these terms.

D. State Monopolies

Constitutional Article 28 prohibits monopolies and monopolistic practices. However, the definition of monopolies excludes the activities of the State in the following "strategic sectors": mail, telegraphy and radiotelegraphy services; oil and other hydrocarbons; basic petrochemicals; nuclear energy; and electricity. In these sectors, competition law does not apply and the role of the CFC is limited. The most relevant

activities are those in the energy sector (oil and electricity), which have an important impact on the competitiveness of the remaining economic sectors. In 2006, the joint sales of Pemex, the state oil monopoly, and CFE and CLF, the state electricity monopolies, amounted to 14.3 percent of Mexico's gross domestic product.[13]

The removal of these constraints is a very sensitive issue in Mexico and requires constitutional changes. There is little that the CFC can do in this matter except to identify the costs they impose on the competitiveness of the economy and consumer welfare and to prevent state monopolies from undertaking practices to exclude competitors in related markets outside the constitutional exception.

E. Privatized Sectors

There are several sectors that are now opened to private investments, but were privatized under schemes aimed at maximizing the revenues from their sale rather than promoting economic efficiency and consumer welfare. These structures created entities with large market shares and incentives to undertake exclusionary practices, which have made it difficult for the CFC to promote a pro-competitive environment. Some of these sectors include telecommunications, railroads, airports, and seaports.

In these sectors, the CFC needs to continue investigating and sanctioning exclusionary practices, as well as identifying those cases that merit determination of lack of competition conditions to trigger specific regulations.

[13] This percentage falls down to 8.7 percent if only domestic sales are considered.

F. Leniency Program

The CFC's new powers to investigate cartels involving sophisticated secret arrangements also face challenges. The leniency program approved by the Congress in 2006 has only brought forward one whistleblower so far. The agency is aware that its success requires that its actions have a real dissuasive effect on cartel members, so it is lobbying for increased levels of fines and for supporting current cases with direct and circumstantial evidence.

G. Prioritizing Unilateral Conduct Investigations

In unilateral conduct investigations, the CFC needs to focus its resources on cases that merit review and avoid spending time and effort on cases that do not pose a threat to competition and are filed by companies using the law to protect them from competition. With this in mind, the CFC is undertaking a major revision of its assessment criteria to incorporate a more economic-based approach that will ensure only truly anticompetitive conducts are investigated and sanctioned, while reducing the burden on economic agents of unnecessary proceedings initiated. This approach requires moving away from the mechanized interpretation of the FLEC applicable provisions where a market power screen and evidence of the alleged conduct have led to findings of violations without a thorough consideration of the real or potential consequences of the conduct on competition and efficiency.

VI. FINAL REMARKS

Since its creation in 1993, the CFC has made important progress towards a competition policy that effectively enhances market efficiency and consumer welfare. In enforcing the law, it has:

i. implemented a merger control that effectively identifies and deters corporate amalgamations harmful to competition, without inhibiting or imposing unjustified costs to pro-competitive ones;

ii. eliminated a clear inclination to collude promoted by the historical role of trade associations; and

iii. identified and sanctioned a relevant number of unilateral conducts that hinder the ability to freely access and compete in the market.

With respect to competition advocacy, it has effectively incorporated competition principles in proceedings associated with privatizations and the allocation of concessions and permits, as well as in the design and application of several sector regulations. Finally, it has won key battles before the courts, paving the road for an enforcement of the law based on sound economic analysis.

However, the CFC still needs to overcome fundamental challenges to succeed in the future. On the one hand, it needs to prosecute more complex cartel activities based on secret agreements. It also has to investigate exclusionary practices undertaken by some of the most powerful corporations in Mexico. On the other hand, it can only impose a reduced level of fines. Furthermore, the judicial system provides incentives to use

litigation as a means of delaying resolutions and lacks the specialized economic expertise needed to consider substantive competition matters in its resolutions.

Therefore, the CFC needs to prioritize and focus its resources on prosecuting the most damaging anticompetitive practices, strengthen its efforts to develop a competition culture, and find more allies to attain law amendments that significantly increase the costs of violating the law. This would foster the CFC's credibility and increase its influence on other areas of government.