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I. INTRODUCTION

On April 30, 2010, the Mexican Congress approved a long-awaited set of reforms to the Federal Competition Law ("FCL").[2] The reform is particularly broad in terms of the general areas of interest covered:

1. A first set of reforms deals with the enhancement of the transparency through which the Mexican Competition Commission ("MCC") enforces competition law. In this regard, for example, the reform proposes the implementation of oral hearings as part of the deliberation procedures carried out by the MCC and the compulsory release of MCC' guidelines in key areas of competition policy as fines, merger control, and the identification of significant market power.
2. A second set of reforms is related to the simplification of administrative procedures regarding the notification of certain type of mergers and the implementation of a mechanism for the anticipated termination of cases involving allegedly anticompetitive behavior.
3. A third set of reforms notably affects the day-to-day enforcement of competition policy in Mexico and involves proposals leading to the strengthening of the MCC's legal powers to implement effective "dawn raids" and also the proposal for the creation of competition-specific tribunals.
4. The final set of reforms approved by the Congress is, from an economic perspective, of particular interest since it deals with the always-controversial topics of fines and joint dominance.

A general discussion of the approved reform is beyond the scope of this paper; the following discussion focuses exclusively on the discussion of some of the challenges that the implementation of the concept of joint dominance may pose to the Mexican competition regime.

II. JOINT DOMINANCE

Nowadays, Mexican competition law uses the concept of Significant Market Power ("SMP") as applied to one-agent contexts—see Article 13 of the FCL. One of the key amendments contained in the reform sent by President Calderón to Congress is directed to the extension of the SMP concept to multi-agent settings, in which a set of economic agents can be identified to have, collectively, significant market power. In principle, the proposal seems to be an innocuous extension of an economic concept already contained in the law. However, the

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[2] The reform still needs to be validated by the Mexican Senate.

extension of this concept to multi-agent settings is far from being straightforward, as discussed below.

A first element of discussion deals with the concept of joint dominance itself. The law and economics of joint dominance is not conclusive either on the scope of the concept or on its best practice for antitrust analysis. Let's start by discussing the scope of the concept. Joint dominance is usually interpreted in terms of the ability of firms to tacitly collude.[3] A workable definition of joint dominance is provided by Massey & McDowell (2008), who define it as a:

> …statement about a structure of a market that is such as to facilitate to the point of making probable or even possible a level of tacit collusion between the small number of large players that form the supply side of the market, or the bulk of the supply side.[4]

The definition of joint dominance as a statement about a "structure of the market" emphasizes the role played by the structural conditions that have the potential to facilitate or trigger tacit collusion. This is to say, according to the above definition, joint dominance refers essentially to the identification of a set of structural conditions that has the property of facilitating tacit collusion between firms. From this perspective, actual behavior of firms is of much less relevance (if any) for the determination of joint dominance in a market. In this context, a natural question arises: Does joint dominance exist automatically as long as those structural conditions are present in a market? Or, is it truly necessary to support the determination of joint dominance with some sort of evidence that shows that some type of anticompetitive behavior has taken place? The case law in different jurisdictions provides rather ambiguous answers to these questions.

Fortunately, the economics underlying these questions are clearer: A case for joint dominance can only be based on arguments showing that some sort of anticompetitive behavior is occurring in the marketplace. For example, in its decision of the *Airtours/European-Commission* case (2002), the European Court of First Instance (now the General Court) identified three necessary conditions for establishing the existence of joint dominance:

1. From the perspective of the economic agents, the market must be sufficiently transparent to monitor the behavior of the competitors;
2. There should be a deterrence mechanism that reduces the incentives of firms to deviate from the "common policy;" and
3. The competitive environment should be such that the reactions of actual or future competitors do not affect the maintenance of the "common policy."

These three conditions establish a standard for the assessment of joint dominance provided some lack of competition is (implicitly) assumed in the background. Otherwise, the usefulness of these three conditions can be questioned. For example, one can imagine a perfectly competitive industry satisfying all three conditions—and, in which, the "common policy" is simply pricing at marginal cost and the deterrence mechanism is the market price itself.

[3] Explicit collusion between firms is normally treated in antitrust laws as an independent violation. In Mexico, explicit collusion is referred as an "absolute monopolistic practice" which, according to best international practices, represents a *per se* violation of Mexican competition laws.

[4] P. Massey & M. McDowell, *Joint Dominance and Tacit Collusion: An Analysis of the Irish Vodafone/O2 Case and the Implications for Competition and Regulatory Policy*, Working Paper WP08/05, School of Economics, University College Dublin (2008).

Notwithstanding the fact that such industry satisfies all three conditions, it would make no sense to construct a case for joint dominance in such an industry. This example highlights an important point, at least from the economic perspective: A (robust) case for joint dominance can only be constructed when some sort of anticompetitive behavior has been observed.

In the context of this discussion, let's assess the proposal of implementing the concept of joint dominance in Mexican competition law. The proposed reform of Article 13 of the FCL states that the determination of joint dominance should consider, as basic criteria, firms' market shares and the ability of those firms to jointly fix prices or restrict output in conditions in which competitors lack the ability to counterbalance such actions.[5]

These basic criteria create some degree of definitional ambiguity. For example, let's assume an industry with N symmetrical firms having identical market shares.[6] Let's divide this industry into two sets: a first set of N-1 firms and a second set containing 1 firm. According to the criteria, the N-1 firms are jointly dominant since their joint market share is particularly high and the single outside competitor probably lacks the ability to counterbalance this joint SMP. The problem with this decision is that another arbitrary partition of firms may also conduce to the determination of joint dominance. For example, it is likely that, when N is sufficiently large, a partition into two sets of N-5 and 5 firms would also lead to a determination of joint dominance for the set of N-5 firms. The point is that relying on joint market shares and joint ability to control prices or output *only* is not a good basis for determining joint dominance since, in such a case, an arbitrary set of firms can be identified as jointly dominant.

On the positive side, one should observe that the proposed reform of Article 13 of the FCL does not rely only on the consideration of the structural conditions prevailing in a market but also on some sort of behavioral criterion. Indeed, the proposed Article 13 explicitly establishes that, for the determination of joint dominance, the competition authority should also consider the "recent behavior" of the firms participating in the relevant market.

In principle, the consideration of a behavioral criterion in Mexico for the construction of a robust definition of joint dominance is encouraging since, as mentioned before, a strong case for joint dominance can only be based on elements of observed anticompetitive behavior. However, the introduction of a behavioral criterion in the construction of joint dominance is not exempt from complexities. Indeed, a case for the determination of joint dominance would require, from the perspective of a behavioral criterion, to show that observed prices are significantly higher than the prices that would prevail in a more competitive environment. This, in turn, would force competition authorities to determine some sort of competitive price in order to assess whether current behavior is compatible or not with joint dominance. The fact is that the assessment of competitive prices is not only a complex task on its own, but it is also a task that is well beyond the reach of most competition authorities and, certainly, well beyond the reach of the MCC.

To sum up, a necessary condition for the construction of a robust case of joint dominance requires the identification of competitive damage. Since competition authorities are usually ill-

[5] The proposed new article 13 of the FCL also includes an evaluation of barriers to entry and input access for the determination of single or joint dominance. The consideration of these factors is included in a subsequent discussion.

[6] Assume N to be sufficiently large.

equipped to perform this task in an efficient and systematic manner, the identification of joint dominance tends to be less robust and highly prone to errors.

The complexities of constructing a robust concept of joint dominance in Mexico are not limited to the above discussion. It is possible to identify at least two other problem areas. First, there is evidence that the transition from joint dominance to explicit collusion cases is blurry; there are instances in which joint dominance may be difficult to differentiate from collusive practices through subtle mechanisms. In May 2010, for example, the Competition Commission of Pakistan conducted a "dawn raid" at the offices of the Pakistan Poultry Association ("PPA") because its website displayed poultry product prices on a daily basis. Given that the PPA is not involved in the production or sale of any poultry products, it is not clear whether the association was, in fact, functioning as a collusive mechanism or whether the association was merely a "focal point" for the participants in the industry. In Mexico, a similar case was recently filed by the MCC in the truck transportation industry.

Second, as long as the concept and use of joint dominance in Mexico is not based on strong foundations, there are important risks of unnecessarily expanding the scope of *ex ante* regulation. Indeed, Mexican industries can be subject to *ex ante* regulation provided the MCC finds they lack conditions for effective competition. Now, in cases where a weak use of joint dominance leads the MCC to determine a market has ineffective competition, *ex ante* regulation of the industry may be called for in circumstances in which this is probably unnecessary.

III. CONCLUSIONS

During the coming weeks, Mexico will be discussing a set of reforms in its competition law. From an economic perspective, one of the key reforms proposed refers to the adoption of the concept of joint dominance. From a theoretical perspective, the construction of a robust concept of joint dominance should be based not only on the identification of the structural conditions that facilitate it, but also on the identification of the competitive damage. The proposed reform to the FCL in this matter seems to identify the essence of the problem, but it remains limited from a theoretical and operational perspective. It is true that the approval of this reform would still require the revision of complementary regulations and (hopefully) the release of guidelines on this matter, but it is also clear that such a complex concept needs to be discussed more broadly before the implementation of any legal amendment. The debate is open and the stakes are high.