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## Competition Advocacy in Mexico: Lessons From the Past Decade

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## I. THE IMPORTANCE OF COMPETITION ADVOCACY IN MEXICO

Competition advocacy is sometimes treated like enforcement's poor cousin; academic debate, practitioners' attention, and agency priorities tend to be geared towards enforcement across the world. And rightly so, to some degree: advocacy is much more variable in its methods and ethereal in its outcomes. Even worse, it sometimes borders suspiciously on mushy public relations, instead of the solid analytical terrain of enforcement.

But nonetheless, advocacy is an essential part of a competition agency's toolkit, especially in jurisdictions where markets still have shallow roots and competition is a newfangled concept struggling to hold its own against state intervention and rent seeking. The Mexican case is a good example, for several reasons:

First, in spite of the past two decades' far-reaching economic liberalization, the Mexican economy still suffers under the legacy of the state-led, corporatist economic policy that held sway for at least sixty years before that, and which lingers in vast pockets of anticompetitive regulation and all too frequent distrust of market mechanisms in Government, Congress, the Judiciary, and the general public.

Second, these conditions tend to be concentrated in services that have a horizontal impact on the rest of the economy, such as telecommunications, transport, energy, and financial services. Trade liberalization in the 80s and 90s brought market discipline to those sectors of the Mexican economy where competition from abroad was a factor; but in non-tradable sectors—for example the services mentioned above—this impulse to modernize regulation and adapt to market conditions was absent, thus yielding a dual economy that holds back competitiveness and harms consumers in downstream markets (i.e., most of the economy).

Third, advocacy, when it is successful (for example through the removal of artificial barriers to entry or market distortions), allows structural changes to competitive dynamics, shifting incentives permanently and across the board, instead of relying on the case-by case threat of competition enforcement. For an agency that is one of the smallest in the world relative to the size of the economy it regulates, this makes it especially attractive to devote some of its scarce resources to advocacy efforts.

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## II. STRATEGIES AND RESULTS OVER THE PAST DECADE

One of the challenges of competition advocacy vis-à-vis enforcement is its lack of clear-cut boundaries, instruments, and tasks. This makes it especially important to establish broad overall priorities and stick to them over the vagaries of immediate needs, to avoid scattering and ultimately wasting resources on an almost infinite array of worthy goals.

In the case of the CFC, this has meant focusing on three key constituencies, on the assumption that efforts in these arenas have the highest potential payoff in the current situation of the Mexican economy. Obviously, advocacy goals and tools differ from one to the other, but it is the linkage among them that has essentially defined the strategy.

### A. Public Awareness

Increased public awareness, of course, is the holy grail of competition advocacy anywhere. In Mexico, with the economic structure discussed in the previous section, it is nothing less than essential: Mexican policymakers in government and Congress, even more than their counterparts elsewhere, face the bleak choice of giving in to (very concentrated and powerful) interest groups by skewing decisions in their favor or affecting these interests—with very little support from a scattered, uninterested public.

The CFC, by its statutory independence and its clear-cut mandate (and in spite of its obvious and painful resource constraints), is uniquely placed to help offset this political imbalance. This is why, over the past decade, its efforts to influence policy through technical arguments have been supplemented by a very robust willingness to take the discussion public.

It is very unlikely that the argument for pro-competitive policy will be won around a small table, where consumers are rarely represented. If, however, discussion is public and consumers are actually listening, it is much harder to argue—or to accept—that consumer welfare needs to take a back seat to producer interests.

Speaking of consumers, one of the central planks of the Commission's outreach efforts has been precisely to frame the issues in terms of their impact on consumers. The Mexican Competition Law defines overall efficiency as its aim, and that is the analytical standard applied in every decision. However, for communication purposes, it has proven to be much more effective to highlight consumer welfare, in keeping with the general thrust of mitigating the collective action problem outlined above.

Which takes us to the most important aspect of the CFC's efforts to raise public awareness: plain language. The litmus test for communication, obsessively applied in internal discussion, is "Would my grandmother understand this?" (Grandma, not surprisingly, is less than fascinated with the finer points of the elasticity of substitution or the particulars of corporate structure).

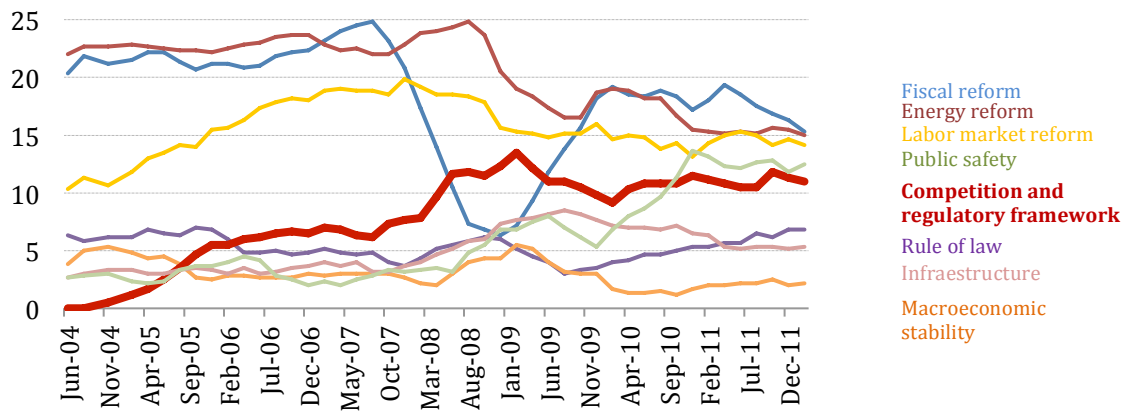
All of the above imply risks for the agency, from losing nuance and precision to getting mired in acrimonious debate. But against this stands the increasing presence of competition in public debate, among policymakers, in academic and intellectual circles, and in the press. Over the past ten years, competition has gone from being a non-issue to one of the core economic problems in Mexico, as perceived by both economists (see graph below) and political

commentators.<sup>2</sup> Surely this is a much better platform for pushing actual precompetitive regulatory changes.

### **Main policies to foster higher levels of investment in Mexico**

Central Bank survey of private sector economists<sup>3</sup>

% of responses, moving average (six periods)



## **B. Government and Congress**

Hand in hand with an increased focus on raising public awareness has gone a much higher profile of the CFC's advocacy activities vis-à-vis government and Congress.

One of the most effective tools in this effort has been market studies focusing on the effects of competition-distorting regulation in specific sectors. The CFC has devoted significant resources to this effort, yielding in-depth analyses of issues such as technological convergence in telecommunications, broadcast contents, airports, foreign trade regulation, the pension system, and retail banking, among others.

Since the (very specific, sometimes down to the legal text of proposed changes) recommendations contained in market studies and more *ad hoc* opinions on regulation are non-binding, it has come down to the CFC's powers of persuasion to translate them into legislative or regulatory action. Here, of course, the strategy of engaging in public discussion examined above has been essential; but equally indispensable has been the ability to discuss technical matters on equal footing (but without slipping into jargon) with sectoral regulators, specialists, and interest groups.

One of the resources the CFC has found most useful in its dealings with Congress and government has been the continuous reference to international best practice. Relying on it—and, when feasible, inviting international experts and foreign policymakers to reinforce the CFC's point—has been instrumental in counteracting the very common objections by interest groups

<sup>2</sup> Recent examples include, Aguilar Camín, Héctor and Jorge G. Castañeda, *Un futuro para México*, Punto de Lectura 2009; Elizondo Mayer-Serra, Carlos, *Por eso estamos como estamos: La economía política de un crecimiento mediocre*, Debate 2011; Dresser, Denise, *El país de uno: Reflexiones para entender y cambiar a México*, Aguilar 2011.

<sup>3</sup> Banco de México, *Encuestas sobre las expectativas de los especialistas en economía del sector privado 2003-2012*

that (a) the Commission is peddling esoteric niceties that bear no relation to reality or (b) the agency has an axe to grind and is pursuing an (usually unspecified) personal vendetta.

Unfortunately, but not surprisingly, the success percentage in advocating pro-competitive regulatory change is in the low double digits, at the best of times. But there have been some notable successes; for example, a significant unilateral reduction of tariffs on industrial goods by the government, boosting competition from abroad, and the prohibition by Congress of the dual commission (on holdings and inflows) charged by private pension fund managers, which essentially made it impossible for non-actuaries to calculate and compare the real cost of the services offered by different providers.

But perhaps the most salient example of the potential of vigorous advocacy are the far-reaching reforms to the competition law enacted in 2011, after a legislative process that formally lasted a bit over one year but whose foundations were laid much earlier. As a result of these reforms, Mexico has finally acquired a competition enforcement toolkit on par with international best practice (see table below), which had been successfully opposed by vested interests since the Law's inception in 1993.

#### *2011 Reforms To The Competition Law: Main Features*

	<b>Before</b>	<b>After</b>
<i>Maximum fine</i>	~7 million USD	10% of annual revenue in Mexico
<i>Criminal sanctions</i>	None	3-10 years for hard-core cartels
<i>On-site searches</i>	Pre-announced	Surprise <sup>4</sup>
<i>Cautionary measures</i>	None	Suspension of practice

### **C. The Judiciary**

In addition to the tools discussed above, passage of the 2011 reforms to the Competition law was greatly helped by the perception that the Commission was using existing enforcement powers fully and judiciously, which in turn hinged upon the agency's ability to point towards an improving enforcement track record and a mounting rate of judicial confirmation of CFC enforcement decisions.

A better batting average in the judiciary has many causes, including exhaustive investigation, attention to procedural issues, and careful legal reasoning (all of which depend, to a non-negligible degree, on mounting institutional experience in a young agency like the CFC). But it can also be driven by advocacy vis-à-vis the Judiciary (as opposed to pleading an actual case before it).

In Mexico, competition cases are heard by non-specialist judges who review all kinds of administrative decisions, and who can scarcely be expected to be familiar with the intricacies of

<sup>4</sup> Only once a formal investigation has been launched.

competition law, especially since, when compared to the rest of the Mexican legal corpus, it relies to a truly extraordinary degree on economic concepts that defy easy categorization or even precise, unchanging definition. Not surprisingly, competition cases have traditionally been decided on superficial formal grounds, and sometimes with significant delay.

Part of this problem has faded away with increased public awareness of the importance of competition policy, especially the emphasis on the effects of competition (and, therefore, of specific competition cases) on consumer welfare. In recent years, competition cases before the Judiciary are addressed much more expeditiously, and the increased grasp of their importance has led to more in-depth analysis by judges.

This level of analysis, of course, has led to the challenge of making available to judges the analytical tools and standards necessary for this kind of scrutiny. The task is complicated by the fact that the Commission is a party to judicial review, and is therefore quite legitimately supposed to have an interest in its outcome.

The most efficient way the CFC has found to overcome this challenge is to foster contact and discussion between Mexican judges and their counterparts in other jurisdictions, where judicial familiarity with competition analysis is greater due to longer experience or specialization. Workshops where experienced foreign judges share their knowledge with their Mexican peers, periodically organized by the Judiciary's training academy with technical and logistical support by the CFC, have substantially flattened the learning curve for judges in Mexico. And general reference materials prepared by the CFC have given permanence to the insight gained in these workshops.

Better-assembled cases and advocacy efforts have resulted in a turnaround in judicial performance. Whereas the Commission prevailed in less than half of court cases in 2004-2007, the CFC decision was upheld in 74 percent of cases in the past four years. Still far from ideal, but nonetheless a very significant improvement.

### III. LESSONS LEARNED

The CFC has honed its advocacy skills by trial and error, overcoming many blunders and misfires to gradually learn what works and what doesn't in the particular environment of the Mexican economic and political landscape. It hasn't always been a smooth ride, and the task ahead is surely even bigger than the one behind. Providing guidance to economic agents, for example, or contributing to a more vigorous academic debate, or taking advocacy to the sub-national arena (where competition culture across the board tends to be even less developed) are still in their infancy.

Nonetheless, a few key lessons have emerged that will hopefully be useful in the future:

First, when done right, advocacy and enforcement support each other. There are few more persuasive arguments to be used in advocacy efforts than the tangible changes in competitive conditions brought about by effective enforcement actions. And at the same time, as discussed above, effective advocacy can solve or prevent competition problems structurally and thereby free resources for enforcement in other areas.

Second, advocacy relies upon being able to craft a clear, persuasive argument and to deliver it in an agile, timely, and impactful fashion. The institutional skills needed for advocacy

are not the same as the ones that make successful enforcement possible. This challenge raises long-term issues that have to be sorted out by the competition agency, among them the amount of resources to be dedicated to advocacy, the interaction (and crossbreeding) between enforcement and advocacy teams, and an institutional arrangement that gives advocacy the room to maneuver without compromising the consistency between advocacy and enforcement. None of these issues are easy, but all of them are essential to effective advocacy.

And finally, advocacy is by no means a substitute for enforcement; but the same is true the other way around.