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I. INTRODUCTION

For almost 20 years private enforcement for damages of competition law in Mexico was non-existent.[2] As discussed below, there have only been two cases tried before civil courts seeking individual redress for damages as a consequence of violation of Mexican competition law. One explanation for this low level is that, different from other jurisdictions (i.e. the United States), private enforcement in Mexico cannot commence until the competition agency has determined—by an unchallenged resolution—that a violation to competition law has occurred. In this regard, Mexican competition law has been more regulatory- than court-driven.

Some other features also important to keep in mind: (i) competition law in Mexico is reserved only for the Federal Competition Commission's ("FCC") jurisdiction;[3] (ii) there are no state competition agencies and, therefore, no state antitrust private actions;[4] and (iii) class actions for competition matters were non-existent before the 2011 amendment to the Federal Code of Civil Proceedings[5] and the May 2011 amendment to the Mexican Competition Law ("FLEC").

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[1] Respectively, Senior Partner and Associate at Barrera, Siqueiros y Torres Landa, S.C. Mexico City.

[2] The Federal Law of Economic Competition ("FLEC") became effective on June 23, 1993.

[3] This assertion could change in the near future due to the bill proposal launched by the Mexican President and approved in March 2013 by the House of Representatives of Mexico whereby: (i) a new Federal Economic Competition Commission will be created and will have constitutional autonomy; (ii) the current FCC will be dismissed; (iii) a new 7-Commissioner Agency will take over competition law in Mexico; (iv) this new Federal Economic Competition Commission will lose its jurisdiction in telecom competition cases which will be heard by the new telecom regulatory and antitrust agency to be created ("Ifetel"), among other relevant changes that is part to the amendments to the Mexican Constitution §28. As of today, the Mexican Senate is discussing the bill proposal approved by the House of Representatives. Once approved, a majority of the States of the Mexican Republic has to approve the bill in order to be finally signed by the Mexican President and published at the Federal Official Gazette of Mexico.

[4] In 2012, a representative of the legislature of the State of Nuevo León launched a bill proposal to create private antitrust actions before local judges for violations to the new State statute in competition matters to be created as result of the bill. This bill brought a debate as to whether Mexican competition law allowed State competition statutes or, as it has been, such authority belongs only to the Federal Congress. As resolved by the Supreme Court in a highly arguable judgment from the technical standpoint, competition law is reserved to the Federal Congress. [*See* COMPETENCIA ECONÓMICA. EL CONGRESO DE LA UNIÓN ESTÁ FACULTADO EXPLÍCITAMENTE POR LA CONSTITUCIÓN FEDERAL PARA LEGISLAR SOBRE LA MATERIA DE MONOPOLIOS Y, POR ENDE, AL EXPEEDIR LA LEY FEDERAL RELATIVA, NO INVADE LA ESFERA COMPETENCIAL DE LAS ENTIDADES FEDERATIVAS, Primera Sala, Suprema Corte de Justicia de la Nación, Novena Época, Tesis 1a. LXIV/2002, Semanario Judicial de la Federación y su Gaceta, Tomo XVI, Septiembre de 2002, Página 254, Registro 186,053]. As of today, this state bill has been somehow frozen.

[5] This class action amendment became effective on February 29, 2012.

Before then, the only entity with standing to bring class actions in competition matters was the Federal Consumer protection agency (Profeco); it has not brought any since 1993. This lack of activity provided an important impetus for the 2011 class action amendment.

The May 10, 2011 amendments to the FLEC set forth a questionable provision that would allow private actions without a prior unchallenged finding of the FCC. Practitioners have conflicting positions regarding the validity of this provision; nothing has been resolved because no private competition action has been submitted since the amendments entered into force. It seems also difficult to believe that, despite the new provision, private actions without an FCC's finding will flourish since—as explained below—there is a binding precedent of the Supreme Court that bans such possibility.

II. PRIVATE ACTIONS: A MATTER OF INSTITUTIONAL DESIGN

Under Mexico's competition system architecture, the FCC is the sole body with standing and authority to investigate, prosecute, and adjudicate violations of Competition Law.[6] In other words, the FCC has had the monopoly on competition actions since its creation in 1993.

Unlike in other countries, the Mexican Congress conferred competition enforcement exclusively to the FCC, as a specialized administrative agency. The judiciary cannot find—as a trial court—violations to competition law. Thus, Mexican judges lack jurisdiction to adjudicate whether or not there is an infringement to Competition Law. They also lack the ability to fine the perpetrators of the violation. Judiciary intervention in competition matters seems to be limited to (i) constitutional challenges (*Amparo*) and (ii) damages claims.

III. PRIVATE REDRESS: COMPETITION DAMAGES' CLAIMS

Until 2011, private competition actions in Mexico were limited to claim damages only after a definitive—and unchallenged—decision of the FCC had already determined the existence of an infringement to the Competition Law (hard-core cartels, vertical restraints, or prohibited mergers).

The Supreme Court declared,[7] in two intellectual property cases, that the existence of infringement, as determined by a specialized administrative agency, was the necessary procedural requirement to claim damages resulting from an administrative law infringement. In these cases, the Supreme Court essentially ruled that a private action for damages in intellectual property matters required a prior finding of the Mexican Industrial Property Institute ("IMPI"). This

[6] Competition Law §§ 23, 24-I and 24-IV

[7] *See* PROPIEDAD INDUSTRIAL. ES NECESARIA UNA PREVIA DECLARACIÓN POR PARTE DEL INSTITUTO MEXICANO DE LA PROPIEDAD INDUSTRIAL, SOBRE LA EXISTENCIA DE INFRACCIONES EN LA MATERIA PARA LA PROCEDENCIA DE LA ACCIÓN DE INDEMNIZACIÓN POR DAÑOS Y PERJUICIOS. Primera Sala, Suprema Corte de Justicia de la Nación, Novena Época, Tesis 1a./J. 13/2004, Semanario Judicial de la Federación y su Gaceta, Tomo XIX, Mayo de 2004, Página 365 Registro 181491. *See* DERECHOS DE AUTOR. LA PROCEDENCIA DE LA ACCIÓN DE INDEMNIZACIÓN DE DAÑOS Y PERJUICIOS EN LA VÍA JURISDICCIONAL SÓLO ESTÁ CONDICIONADA A LA DECLARACIÓN PREVIA DE LA AUTORIDAD ADMINISTRATIVA CUANDO LA CONTROVERSIA DERIVA DE UNA INFRACCIÓN ADMINISTRATIVA O EN MATERIA DE COMERCIO REGULADA POR LOS ARTÍCULOS 229 Y 231 DE LA LEY FEDERAL DEL DERECHO DE AUTOR. Primera Sala, Suprema Corte de Justicia de la Nación, Novena Época, Tesis 1a. XXIX/2011, Semanario Judicial de la Federación y su Gaceta, Tomo XXXIII, Febrero de 2011, Página 613, Registro 162877.

rationale still seems entirely applicable to competition matters. Thus, a previous FCC finding is a *sine qua non* condition in every damage claim seeking private redress. To the best of our knowledge there has not been any successful private action so far in Mexico.

As a general rule, damages under Mexican law are compensatory in nature and, therefore, damages are limited to those caused by a direct and immediate breach of competition policy.[8] In other words, unlike other jurisdictions (i.e. the United States), there are no treble damages for violation of competition law. Likewise, indirect, consequential, or punitive damages will not be available.

In addition, Mexican law allows for very limited discovery; there is no trial by jury and proceedings are more written than oral. These features, along with needing both the judiciary and practitioners to bring about any new practices, make it difficult for actions to evolve to their full potential. Competition law has not yet provided any exceptions to this rule. Hence, indirect, consequential, and punitive damages are prohibited.

IV. THE CONTROVERSIAL 2011 AMENDMENTS TO COMPETITION LAW

FLEC §38 is the relevant rule to assert damage claims in competition matters. Since FLEC's enactment in 1992 it has suffered two major amendments; one in 2006 and one in 2011. The original FLEC §38 required plaintiffs to prove damages during the competition proceeding through ancillary proceedings held before the FCC. As a consequence, a finding of breach of competition law would also include a finding and liquidation for damages. Once the resolution (that included a damage finding) became unchallengeable, the party or parties seeking relief could file its (their) damage claim(s) before civil courts. To the best of our knowledge such a situation never happened. Neither individual nor collective or class actions were ever filed under this section.

The 2006 Amendments[9] repealed the requirement to previously prove damages before the FCC in order to file a damage complaint before the Court. The rule changed to allow the FCC to provide to the Court—at its request—an estimation of damages without such finding to be binding on the court.

Finally, the 2011 Amendments were intended to provide the possibility of claiming competition damages through class actions.[10] However, the 2011 Amendment to the FLEC §38 went further than its main objective. This rule modified its wording in a way that may be interpreted to mean that this section entitles private enforcement of competition law before the judiciary without the intervention and prior resolution of the FCC.

The *ratio legis* of the 2011 Amendments was not to introduce a parallel regime of private competition actions and break the FCC's competition action monopoly. Nothing is said

[8] Federal Civil Code §2110

[9] These Amendments became effective on June 29, 2006.

[10] The 2011 Amendments to the FLEC were part of a major amendment to the Mexican legal system since it *inter alia* (i) harshened fines; (ii) led to punishment of hard-core cartel behaviors under the Federal Criminal Code; (iii) created provisional measures; (iv) implemented a more aggressive dawn raids; and (v) separated the investigative and prosecution activities of the Executive Secretary and the FCC, among others. It was eventually the Federal Code of Civil Proceedings that provided detail procedure for class actions, including competition cases.

regarding such a possibility in the Congressional declaration of purpose. In the end, the isolated interpretation of the FLEC §38 seems to allow private competition actions. This rule has not been tested yet.

We consider that the FLEC §38 cannot be interpreted verbatim and in isolation and is contrary to the judicial precedents and the institutional design of the Mexican competition enforcement system.

V. LANDMARK CASES

To the best of our knowledge there have not been any successful damages claims in the almost 20-year application of Mexican Competition Law. Only two cases have been filed but neither was successful for plaintiffs. Both cases resulted from vertical restraint cases.

A. Canel's vs Cadbury Adams[11]

In 1996, Canel's filed a private administrative complaint for predatory pricing against Grupo Warner Lambert México, S.A. de C.V. ("Warner Lambert"). The FCC—after administrative proceedings—acquitted Warner Lambert on the main ground that Canel's did not show evidence of having suffered any harm. Canel's did not appeal (*recurso de reconsideración*) this finding. However, Warner Lambert appealed the FCC's finding of market power in the chewing gum market as well as certain of the FCC's criteria for a finding of predatory pricing to be effective. The Supreme Court eventually said that Warner Lambert lacked standing since it was acquitted and the criteria was a mere recommendation without a binding effect.

Subsequently, the FCC commenced a second administrative proceeding, applying the finding of market power as well as the predatory pricing criteria that was not set forth in the statute but rather created by the FCC. Warner Lambert challenged such resolution and its challenge reached the Supreme Court of Justice. There were special grounds for the unconstitutionality of the FLEC §10-VII since it was the FCC and not the Statute that created the elements of the predatory pricing mischief. Warner argued violation to legal certainty.

In 2003, the Supreme Court declared unconstitutional the "catch all" provision for vertical restraints contained in the FLEC § 10-VII. This finding of the Supreme Court resulted in the FCC's acquittal of Grupo Warner Lambert—later Cadbury Adams México, S. de R.L. de C.V.—("Cadbury") for the predatory pricing mischief that the FCC had fined Warner Lambert for causing in its administrative proceedings.

Despite such acquittal, in 2007 Canel´s filed a damage claim against Cadbury seeking that the local Court for the Federal District find that Cadbury's behavior was a general civil or commercial tort. The ground was that Cadbury—formerly Warner Lambert—incurred a direct violation of the Mexican Constitution §28 (which bans monopolies and monopolistic practices). In its filing, Canel's invoked the fact that the FLEC did not provide for a specific description of what predator´y pricing was—it left to the courts such determination. Under that scenario, it was not necessary for the FCC to render a prior resolution since it would be the court's task to

[11] Direct constitutional proceeding (*Amparo Directo*) number 426/2009 filed by Canel´s, S.A. de C.V. before the 14th Civil Collegiate Circuit Court.

determine whether or not there was a predatory pricing policy. Thus, Canel's asked that a local court make such a determination.

Warner Lambert opposed the claim. *Inter alia*, it strongly stated that the wording of the FLEC §38 made imperative a resolution of the FCC for there to be predatory pricing. If predatory pricing did not exist under competition law (at that time), then no damage redress could be sought. It also raised a defense based on the statute of limitations having elapsed.

The courts (trial-court, appeal, constitutional challenge, and an extraordinary challenge before the Supreme Court) resolved the case in favor of Cadbury's position. The lesson learned: Mexico is a country of laws rather than judges. Therefore, it is a legislative rather than judiciary task to determine those behaviors that violate Mexican competition law[12] as shown by the courts having acquitted Cadbury from this multi-million dollar complaint.[13]

B. Big Cola vs Coca-Cola[14]

After the FCC declared that some Mexican Coca-Cola bottlers were responsible for vertical restraints (exclusivities),[15] Big Cola filed a *commercial* claim seeking damage relief. The Court declared that competition damages must be claimed in a *civil* rather than a commercial proceeding. The reasoning of the court was that the main purpose of a damage claims is to compensate and restitute the plaintiffs—not to obtain a profit. Thus, Big Cola's claim was rejected. Notwithstanding, Big Cola can re-file its claim in a civil claim before civil local courts provided that the statute of limitations has not elapsed.

Finally, it should be noted that the Mexican competition system could be transformed in the following weeks because of a major amendment currently under discussion regarding the Mexican Constitution's §28. This amendment will dismiss the current FCC and remove telecom cases from the jurisdiction of the new constitutional agency to be created for competition matters. As a consequence, there will likely be a new FLEC and some new rules for damage relief.

VI. CONCLUSIONS

1. The Mexican competition system does not allow a direct private enforcement of competition law before courts. The FCC currently has the monopoly on competition actions and it requires a prior finding before seeking damage relief before courts.

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[12] *See* Omar Guerrero & G. Campos, *Límites a la Autonomía Judicial en Materia de Competencia Económica: comentarios en relación con la interpretación judicial en material de Responsabilidad Civil*, PAUTA Competencia Económica, Boletín Informativo del Capítulo Mexicano de la Cámara Internacional de Comercio, No. 62, (Noviembre 2010).

[13] *See* ACCIÓN DE RESPONSABILIDAD CIVIL. NO PUEDE SUSTENTARSE EN EL ARTÍCULO 28 CONSTITUCIONAL, PORQUE ÉSTE NO FACULTA A LOS ÓRGANOS JURISDICCIONALES PARA DETERMINAR QUÉ CONDUCTAS CONSTITUYEN PRÁCTICAS MONOPÓLICAS EN FUNCIÓN DE LOS HECHOS NARRADOS POR LAS PARTES EN UNA CONTROVERSIA. Décimo Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito, Novena Época, Tesis I.14o.C.65 C, Semanario Judicial de la Federación y su Gaceta, Tomo XXXI, Marzo de 2010, Página 2855, Registro 165118.

[14] Direct constitutional proceeding (*Amparo Directo*) number 121/2012 filed by Ajemex, S.A. de C.V. before the 1st Civil Collegiate Circuit Court.

[15] Docket DE-006-200

2. Mexican judges are not competent to adjudicate on the existence of an infringement to Mexican Competition Law. In general, judiciary intervention in competition matters is limited to (i) constitutional challenges (*Amparo*) and (ii) damages claims.
3. Competition damages claims require a prior definitive decision of the FCC determining the existence of an infringement to the FLEC.
4. In Mexico there have not been any successful damages claims in almost a 20-year application of the FLEC. Two landmark cases confirmed such findings.
5. The 2011 amendments to the Competition Law §38 seem to allow private competition actions. This interpretation is controversial and no private competition action has been submitted since the amendments entered into force.
6. The upcoming amendments to the entire framework of competition law in Mexico will make damage relief and private actions an issue for discussion.