

Mexico takes important steps forward in the combat of cartels and implementation of leniency programmes

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More than 10 years have elapsed since the enactment of the Federal Economic Competition Law (FECL). It represents the first institutionalised competition legal framework in Mexico, although the prohibition of monopolies dates back to the enactment of Mexico's political constitution of 1857, which even predates the competition regimes of the US, Canada and the European Union on which the FECL was inspired.

The FECL regulates article 28 of the 1917 Mexican Constitution on economic competition, monopolies and free market access. It is binding to all sectors of the economy in Mexico and all economic agents are subject to its provisions, whether individuals or corporations, agencies or entities of the federal, state or local administration, associations, professional groups, trusts or any other form of participation in economic activities, with the exception of the strategic sectors indicated in the fourth paragraph of article 28 which do not formally constitute monopolies (although from an economic standpoint they are).

The enactment of the FECL was part of the deep modernisation commitments that the Mexican government undertook when negotiating the North American Free Trade Agreement (NAFTA). It required the opening up and further liberalisation of the Mexican economy, which seemed heavily concentrated in several government-owned and recently privatised monopolies and oligopolies controlled by family groups that prevented an effective and open access to both domestic and foreign investors. The FECL developed an effective and enforceable regime to punish cartels and monopolistic practices and control mergers, which affords protection to the competition process and free market access by preventing negative effects upon the efficient operation of the goods and services market.

Monopolistic practices are divided into two categories: absolute and relative. Absolute monopolistic practices are contracts, agreements, arrangements or combinations among competitive economic agents, whose aim or effect is any of the following:

- to fix, raise, agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets, or to exchange information with the same aim or effect;
- to establish the obligation to produce, process, distribute or market only a restricted or limited amount of goods, or to render a specific volume, number or frequency of restricted or limited services;
- to divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, by means of a determinable group of customers, suppliers, time or spaces; or
- to establish, agree upon or coordinate bids or to abstain from bids, tenders, public auctions or bidding.

Absolute monopolistic practices are 'per se' violations of the FECL, and in their analysis no consideration is given to any efficiency gain. Relative monopolistic practices, on the other hand, are deemed to be those acts, contracts, agreements or combinations among economic agents who do not compete among themselves, with the aim of improperly displacing other agents from the market, substantially hindering their access thereto, or establishing exclusive advantages in favour of one or several entities or individuals, which include

tying sales, boycotts and price fixing, predatory pricing, discounts for exclusivity, cross subsidies and discrimination in sale conditions, among others.

Relative monopolistic practices are punishable if and when the economic agent has substantial power in the relevant market and abuses its dominant position. The common test to determine whether the latter has such power is when, due to its market share, it can unilaterally set the prices or restrict the supply or volume in the relevant market without the competitive agents being able to act or to potentially counteract that power.

The FECL created the Federal Competition Commission, which is a semi-autonomous administrative agency in charge of the enforcement of the FECL and its Code of Regulations as well as of the crafting of competition policies and advocacies. The Competition Commission is finally dependant of the Secretariat of Economy.

One of the first and most transcendental enforcement issues occurred at an early stage when the Competition Commission tried to impose fines and penalties based on diverse provisions in the Code of Regulations, but not in the FECL itself. According to Mexican Constitutional Law, any penalties or fines must be based on a specific conduct prohibited in a statute issued by the congress. Therefore, when the Competition Commission tried to impose fines on economic agents found guilty of practices prohibited only under the Code of Regulations, requests for constitutional relief were immediately filed before federal courts and those penalties imposed by the Competition Commission were deemed unconstitutional.

After other unsuccessful enforcement actions of the Competition Commission against established monopolies, perhaps the most noteworthy being the telephony market case, the commission along with different private sectors, industries and legislators, proposed a thorough review of the competition framework in line with international standards and experiences proven to be more effective and adequate. The review also became necessary as the commission's operative tools proved to be legally ineffective or insufficient for the punishment of monopolistic practices in several economic sectors due to the aforementioned unconstitutionality issues determined by the Supreme Court of Justice in several cases. In light of this, the review began.

In 2005, legislators of Mexico's two biggest parties presented a bill to the House of Representatives to amend the FECL. This proposal was the result of a joint effort between the promoting legislators and the Competition Commission, the aim of which was to strengthen competition policy and enforcement in Mexico.

Several industries and private sectors joined the initiative and became very active in lobbying amendments to the FECL, designed to promote and further develop a more effective competition policy framework and to bestow upon the Competition Commission new tools to combat and prevent cartels, monopolies and monopolistic practices. The amendments did not change the core analytical principles of the FECL. They did, however, enhance the Competition Commission's operative tools and provided higher penalties for anti-competitive behaviour.

The amendments clearly address the recommendations contained in the OECD's 2004 peer review of Competition Law and Policy in Mexico and is generally based on international best practices.

The amendments to the FECL were finally approved in April 2006 and became effective on 29 June. These amendments have three different sources: (i) previous rulings issued by the Federal Judicial Power, derived from cases in which the constitutionality of the FECL and its Code of Regulations were challenged; (ii) several regulations previously contemplated only in the Code of Regulations; and (iii) new competition policies existing in other jurisdictions such as the United States and the European Union, which proved to be effective in obtaining relevant information and breaking the secrecy of cartels.

Several steps were taken to strengthen and simplify the Competition Commission's procedures relating to issues such as efficiencies, premerger filings, relative monopolistic practices (equivalent to the US 'rule of reason' approach), verification visits and the creation of a leniency programme that is expected to break through the instability of cartels. Each of these innovations are discussed below. An 'economic agent' was also redefined to comprise any individual or corporation participating in the market, regardless of whether it had commercial or speculative objectives or not – previously the FECL only applied to those individuals or entities deemed to have commercial or economic ends.

Before the reform, the Code of Regulations contemplated different types of efficiency gains that could be argued and raised whenever there was a practice that could be deemed as a relative monopolistic practice. The reform has now eliminated any reference to efficiencies in the Code of Regulations and instead has provided a detailed list of efficiency examples in the FECL, such as the introduction of new products; the use of defective products; cost reductions deriving from new technologies, production methods, asset integration, economies of scale and the production of several goods with the same working capital; the introduction of technologies with which improved products or services may be produced or rendered; as well as any other efficiencies that transfer net benefits to consumer welfare and which largely offset anti-competitive effects of the monopolistic practice.

The premerger control procedure was amended to substantially increase the filing thresholds by 50 per cent in order to focus on transactions most likely to raise competitive issues in the market. The amendments also contemplate early termination of merger screening in cases that clearly do not have adverse effects in the relevant market. The amendments now provide for the analysis of any 'related markets' potentially engaged in a merger, in order to determine whether the proposed transaction might have any anti-competitive effects in these markets. In the past, the Competition Commission would only regularly screen the relevant market in which the transaction was taking place but would not necessarily perform a composed analysis of the effects that related markets may have in the transaction overall.

Before the amendments, mergers that needed to be filed were not subject to any waiting period and the parties concerned could consummate the transaction at once; now, the amendments have empowered the Competition Commission to order, within a 10 business-day period following the premerger filing, that economic agents refrain from consummating the transaction until the Competition Commission has authorised it. In case no resolution is issued, the parties may implement the merger at their own risk as there is no specific penalty for not waiting.

Additionally, any merger subject to notification which has not yet been cleared by the Competition Commission cannot be recorded before the Public Registry of Commerce, the consequence being that some acts entered by the merger might not be enforceable against third parties.

To solve the constitutionality issue mentioned above in connection with relative monopolistic practices, the amendments migrated several conducts contained in the Code of Regulations to the FECL, namely predatory pricing, exclusive dealing (refusal to deal), cross subsidisation, price discrimination and raising rivals. With the migra-

tion, it is expected that the commission will have the necessary and clear legal grounds to combat these practices and be able to impose fines and other penalties.

The Competition Commission systematically encountered difficulties when requesting information to carry out its investigations and was also customary that parties would provide limited or inaccurate information. To efficiently fight cartels and monopolistic practices in the course of law enforcement investigations, the Competition Commission is now empowered to perform verification visits to economic agents under investigation. Since this body pertains to the Executive Branch, it cannot perform a verification visit unless it has been granted a court order. Unlike competition regimes like the European Union (where dawn raids are allowed), a verification visit does not authorise the seizure of files or documents, but only to obtain copies. Furthermore, the scope of these visits is narrowed to those documents and data previously requested to obtain the court order, therefore greatly reducing the chances of obtaining valuable information.

Perhaps one of the most eagerly awaited reforms that is expected to really strengthen the Competition Commission's ability to combat hard-core cartels, is the leniency programme under which the authority may grant leniency to cartel members who have breached the FECL or continue to be in violation of it by engaging in absolute monopolistic practices, as long as a final resolution has not yet been issued closing an investigation procedure.

The programme is based on the idea that strategic interactions between the cartel members can be used by reducing the fine for the first self-reporter ('whistleblower') and imposing higher fines for all other cartel members, each one having an incentive to be the first one to come forward (often described as 'race to the courtroom' by legal scholars). To this end, the Competition Commission will grant full leniency to the first economic agent who approaches it and provides convincing and sufficient evidence to allow it to determine the existence of the monopolistic practice. The economic agent must fully and continuously cooperate with the agency throughout the whole investigation and in the corresponding procedure; additionally, it must also take the necessary actions to end its participation in the monopolistic practice. If the foregoing is fulfilled, the Competition Commission shall impose the minimum fine and no judicial or administrative action shall be instituted.

Those economic agents that do not fulfil the aforementioned requirements may still benefit from a partial leniency and be subject to reduced fines of up to 50, 30 or 20 per cent of the maximum, permitted if it provides additional but convincing evidence for the investigation. To determine the reduction in the fine, the Competition Commission must consider the chronological order in which the requests for leniency were filed and the evidence tendered to that end.

The leniency programme was designed in line with international best practices and is founded on four principles: priority, confidentiality, transparency and advocacy. Priority refers to the full leniency granted to the first economic agent to approach the Competition Commission based on convincing grounds and evidence; and confidentiality implies that all information must be treated as classified, otherwise there would be little incentive to join the programme and the responsible agents would instead try to evade enforcement actions. Transparency relates to the establishment of clear and objective rules that apply under the programme, and advocacy relates to a continuous plan to promote not only the benefits of the programme but the risks in the commission and punishment of said practices.

At this point, criminal prosecution was not proposed as part of the amendments since it is believed that the leniency programme represents a sufficiently attractive incentive and an effective tool that will enable the Competition Commission to break into the secret nature of contrived agreements, taking advantage of their instability by offering

the parties incentives in exchange for total or partial immunity from penalties that would otherwise be applied to them.

Since cartels tend to operate on an international scale, it is expected that the economic agents will analyse the different leniency programmes available in the different jurisdictions in which they operate or may be subject to, in order to approach the competition authorities in a coordinated fashion and get the maximum benefit possible – and avoid potential risks deriving from the simultaneous application of different legislations and leniency programmes.

Before the enactment of the amendments, the Competition Commission could: (i) comment on the adjustments to the federal public administration programmes and policies when their effects could be contrary to competition and free market access; (ii) when requested by the Federal Executive, comment on the amendments to the drafts of laws and regulations, on those items dealing with competition and free market access, and when deemed pertinent; and (iii) render non-binding opinions on competition and free market access regarding the laws, regulations, agreements, circular letters and administrative acts, which did not have legal effects. These opinions are now binding to the agencies of the federal public administration with respect to secondary regulation by other public agencies that could have anti-competitive effects and to programmes and to proposals of laws, regulations, agreements and other administrative acts. Notwithstanding this new authority, the Federal Executive branch (the president) can veto any opinion so rendered.

As an example of this advisory authority, in 2005 the Competition Commission issued opinions on two projects: opinions on reduced entry barriers in the gasoline retail market; and opinions related to the telecommunications sector to promote competition in long-distance phone services, to reduce entry barriers for broadband services and other wireless uses and to enhance the competitive effects of telecom network convergence. It also issued opinions in connection with Government initiatives for new legislation such as the Telecommunications Law and Radio and Television Law, the Law to Promote the Book and Reading, the Commercial Practices Law and the Airport Law.

In line with its participation in the drafting of laws and directives, the Competition Commission may now be able to participate in the negotiation of international treaties regulating competition matters, which as the market becomes more and more globalised,

will contribute to a better coordination and more effective advocacy as experience has proven that cartels are likely to operate on an international scale.

Economic penalties were revised, being the main change in this section on higher fines: new provisions providing that an agent who violates the law more than once may be fined up to twice the applicable monetary amount, or up to 10 per cent of annual sales, or of total assets, whichever is bigger; the addition of a provision allowing the Competition Commission to order the divestiture of assets to eliminate market power, if an agent has been fined more than two times. New fines were also included for specific conducts such as providing false information in a procedure or breaching any commitment made before the Competition Commission.

It is not only private sectors of the economy that form cartels or engage in monopolistic practices – government agencies, whether federal, state or local, have been engaged in these practices or have issued regulations or imposed restrictions creating inter-state trade barriers expressly prohibited by the Mexican Constitution and the FECL. The Competition Commission could investigate these practices and issue a declaration regarding the existence of inter-state trade barriers ordering its suspension, which could be challenged by the respective state agency before the Supreme Court of Justice. Over the years, many cases were investigated and the Supreme Court of Justice finally declared such authority to be unconstitutional, as an agency pertaining to the Executive Branch could not be entrusted with a constitutional control mechanism. To overcome this issue, the amendments now provide that the Competition Commission may only issue an opinion which shall be conveyed to the competent agency of the Federal Executive Branch or the attorney general, as the case may be, for the latter to file the corresponding constitutional claim.

Having covered the most relevant reforms and innovations to the FECL, it can be concluded that the foregoing constitutes a serious step forward in the combat of cartels and monopolistic practices. The amendments have been designed and crafted to overcome the constitutional issues dealt with by the Federal Judicial Power and to follow international best practices that have proven effective in other jurisdictions. The legal community has welcomed these reforms as means of continuing the opening of the economy and reducing distortions in the market that prevent larger and more accelerated growth of the economy.

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