

Mexico's Competition Policy⁷

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Precedents

Since the Political Constitution of 1857, monopolies were prohibited in Mexico. This prohibition continued in the Political Constitution of 1917, establishing in Article 28 that the law shall punish severely and the authorities shall effectively prosecute every concentration or cornering in one or a few hands of prime necessity articles for the purpose of obtaining a rise in prices; every act or proceeding which prevents or tends to prevent free competition in production, industry or commerce, or services to the public; every agreement or combination, in whatever manner it may be made, of producers, industrialists, merchants, and common carriers, or those engaged in any other service, to prevent competition among themselves and to compel consumers to pay exaggerated prices; and in general, whatever constitutes an exclusive and undue advantage in favor of one or more specified persons and to the harm of the public in general or of any social class. In 1983, a constitutional reform was made to Article 28 to include the prohibition of monopolistic practices.

As it can be observed, conducts contained in Article 28 are listed in a non-limited way, being established as a general criterion, that the element that must be present in every prohibited situation is social harm.

In relation to Article 28, two matters must be mentioned. First, Article 28 is included in the Chapter of Individual Rights (Garantías Individuales) which means that it's an obligation for the State to guarantee the competition process and free market access to all individuals. Second, the economic planning and development, in which economic competition is immerse, is an exclusive federal matter and cannot be legislated by local governments.

Federal Law of Economic Competition

The Federal Law of Economic Competition regulates Article 28 of the Constitution regarding economic competition, monopolies and free market access, and was issued on December 24, 1992, becoming effective 180 days later, on June 22, 1993. Its observance is binding in the entire Mexican Republic and applies to all sectors of economic activity. The Law does not have sector exceptions, so all sectors are simultaneously regulated by it and the law pertaining to each sector.⁸

7. Paper prepared for the Fourth Workshop of The APEC-OECD Co-Operative Initiative on Regulatory Reform in Paris, France, 2-3 December, 2003.

8. Yet, the Federal Law of Economic Competition establishes that powers exercised exclusively by the State in strategic sectors (postal service, telegraph and radiotelegraph; petroleum and other hydrocarbons; basic petrochemical; radioactive minerals and nuclear energy generation; and electricity) do not constitute monopolies. Neither do labor unions, privileges granted to authors and artists for the production of their work for a given period of time, and those granted to inventors and individuals perfecting an improvement for the exclusive use of their inventions, and associations or societies of producers that sell their products directly abroad which are the main source of wealth in the region in which they are produced, and which are articles of prime necessity. Nevertheless, in strategic sectors, agencies and entities responsible for the exercise of the powers in those activities are subject to the Law regarding acts that are not expressly considered as strategic sectors.

Federal Competition Commission

This Law created the Federal Competition Commission, which is an administrative entity of the Ministry of Economy, technically and operationally autonomous, and also autonomous to issue its own decisions. The autonomy is one of the most important instruments that the Commission has to fulfill its purpose.

The above mentioned is completed with the independent decisions made by the commissioners. The deciding authority in the Commission is the Plenum, integrated by five commissioners, including the President. It deliberates as a collegial body and decides matters by majority of votes, and the President is empowered with the deciding ballot in the event of tie.

The commissioners are appointed by the President of Mexico and are appointed to serve in their positions for renewable periods of ten years, and may only be removed from office by serious reasons duly justified. This guarantees the independence and autonomy of the Commission, because if the commissioners could be removed by discretion of the President of Mexico, their decisions would be conditioned to exterior factors, such as political parties, other public politics, interest groups, etc.

The purpose of the Commission is to protect the competition process and free market access, through the prevention of monopolies, monopolistic practices and any other restrictions in the efficient operation of goods and services markets. It is not concerned with protecting specific competitors nor with promoting fair competition.

It is empowered to conduct investigations of competition violations initiated at the request of interested parties or by the Commission itself and sanction the existence of absolute monopolistic practices (hard-core cartel conducts), relative monopolistic practices, illegal mergers, and inter-state entry barriers, as well as to report to the Public Prosecutor criminal conducts regarding competition and free market access. In order to carry out investigations, the Commission may request relevant information or documents, as well as summon those involved in the cases, but lacks of inspection powers or leniency programs. In relation to sanctions, the maximum fine is 375 thousand times the minimum general wage prevailing in the Federal District⁹ for having engaged in an absolute monopolistic practice, and 225 thousand times the minimum wage for having engaged in a relative monopolistic practice or participating in an illegal merger. It is also empowered to investigate the existence of effective competition or of substantial market power in the relevant market in question and also the relevant information and documents may be required.

The Federal Law of Economic Competition establishes clear procedures that are consistent with the “duly process” principle, providing legal security for all economic agents. The Commission's resolutions may be subject to a review process before the Commission. Afterwards, the amparo trial, a constitutional action before a Federal District Court in order to evaluate the constitutionality of the Commission's decisions, can be initiated. On the other hand, fines or any economic sanctions imposed by the Commission may be reviewed by means of an administrative action before the Federal Court of Administrative and Fiscal Justice.

To promote legal security and transparency, the Commission also publishes an annual report on competition policy that includes summaries of the most relevant cases reviewed under the Law, and a gazette of competition that includes its decisions and the criteria applied when enforcing the Law. Summaries of those decisions are also published in the Official Journal of the Federation, and the complete texts of the Law, the Regulations, annual reports, and gazettes are available at the Commission's Internet website.

9. \$43.65 pesos (around US\$ 4).

Further seeking transparency, recently the Federal Law on Transparency and Access to Public Governmental Information became effective and it binds the government, including the Commission, to allow individuals access to all public information. This Law focuses mainly in granting transparency in procedures and actions taken by the government.

In competition policy matter, the Federal Competition Commission is empowered to issue opinions: i) concerning adjustments in programs and policies of the Federal Public Administration, whose effects may harm competition and free market access; ii) when requested by the Federal Executive, referring to modifications of law and regulation projects regarding competition and free market access; iii) when considered appropriate, concerning competition and free market access, regarding laws, regulations, agreements, orders and administrative acts, without such opinions having any legal effect, and without the Commission being compelled to issue an opinion; iv) regarding effective competition and substantial power; and, participate with the appropriate entities in the celebration of international treaties, agreements or pacts, in connection with regulations or policies involving competition and free market access, in which Mexico is or intends to be a party.

Consumer Protection

Consumer surplus or the maximization of consumer's welfare is not expressly included as an objective of competition law, nevertheless, consumer surplus is a necessary result of the competitive process and enhancement of economic efficiency, because once monopoly power is reduced, competition process starts, which betters quality of goods and services and at the same time reduces prices.

Specifically, protection of consumers attains to the Federal Prosecutor for Consumers (Procuraduría Federal del Consumidor), since its objective is to promote and protect consumer rights, and to procure equity and legal security in relationships between suppliers and consumers.

Communication between the two agencies has increased in the past years, for example, the Commission published in its Annual Report 2001 the "Report of the Expert Meeting on Consumer Interests, Competitiveness, Competition and Development" held at the United Nations Conference on Trade and Development referent to the Federal Prosecutor of Consumers relationship with the Commission, highlighting that consumer protection and competition policies are mutually supportive, and therefore properly implemented competition and consumer policies can make a key contribution to competitiveness and sustained development.

Relevant Cases and Challenges

Ten years has passed since the Federal Law of Economic Competition became effective, and in these years, the Commission has investigated and sanctioned many economic agents with substantial power in the relevant market that have committed monopolistic practices, like the case against Warner Lambert for predatory pricing in the chewing gum market. In 1996, the Commission initiated an ex-officio investigation involving Group Warner Lambert México, S.A. de C.V. (now Cadbury Adams México, S. de R.L. de C.V.) for incurring in predatory pricing. Warner Lambert, improperly seeking Canel's displacement of the chewing gum market, launched a new trade mark "Clark's" and sold it below its total average cost. In 1998, the Commission found that Warner Lambert had substantial power in the chewing gum market with a share between 65% and 73% and power to control price, that its prices were persistently below average total cost, and that Canel's, his principal competitor, had lost measurable market share as a result of Warner Lambert's conduct. Consequently, the Commission imposed a fine and injunction, which were later overturned and remanded by a reviewing court. In 2002, the Commission issued and reaffirmed a new resolution, restating its original determinations, which is now under judicial review again and is likely to be solved soon.

In 1997, the Commission declared that Teléfonos de México, S.A. de C.V. (Telmex) had substantial power in five basic telecommunications markets: intercity transportation, access, national long distance, international long distance, and basic local telephone system. The declaration was issued in compliance with Article 63 of the Federal Law of Telecommunications, that establishes that telecommunications regulatory authorities may set up specific obligations for the public telecommunications net concessionaire that has substantial power in the relevant market in accordance to the Federal Law of Economic Competition. In September of 2000, the regulatory authority issued such obligations. This declaration was overturned and remanded by a reviewing court. In 2001, the Commission issued a new declaration, reaffirming its original determinations, which is also under judicial review. Nevertheless, new specific obligations have not been issued.

In 2001, Pemex Refinación was involved in two procedures before the Commission regarding the distribution and commercialization of oils and lubricants for automobile use in gas stations and self service stations markets. Pemex Refinación is a subsidiary of state-owned petroleum company Pemex, and the latter has a constitutional monopoly over petroleum, but not oils and lubricants, since in 1990 they were taken out of the strategic area and therefore fell under the scope of the Federal Law of Economic Competition. However, Pemex Refinación imposed exclusive clauses in the supply and franchise contracts celebrated with gas and self service stations forbidding them to sell oils or lubricants different from those of Pemex's brand, any other brand of its property, or from Pemex participating entities, like Mexicana de Lubricantes, S.A. de C.V. (Mexlub). During the procedure, it was proven that Pemex Refinación had committed relative monopolistic prices in contravention of the Law, and so far impaired free market access to other oil and lubricant companies, and was ordered to modify such contracts concerning exclusivity clauses. Actually, Pemex Refinación has accepted responsibility and negotiations are taking place with the Commission.

There are many challenges in competition policy. The abuse of the amparo trial has delayed the issuance and compliance of the sentences of the Commission in benefit of the offenders, hindering its efforts to achieve its objectives. In addition, limited understandings of the Law and competition policy within the judicial system causes delays in the judicial process and consequently in the implementation of the Commission's findings in a large number of cases. In this way, an efficient and prompt judicial system is fundamental in the protection of competition process and free market access. Without it, it's impossible to punish severely and persecute with efficiency anti-competitive conducts, in observance of the Constitution.

Competition policy must reach all three levels of the government: municipal, state, and federal. Many municipal and state authorities ignore the benefits of the competition process and free market access, and are habitually protective of their markets, losing sight of the public interest and protecting the privileges of established companies. It's common to see entry barriers in milk, tomatoes, poultry, eggs and fresh meat markets, among others, or anticompetitive regulatory measures, like limitations on the number of taxi permissions, and limitations to hire recorded music in favor of live music.

Some federal authorities are also reluctant to exercise their powers taking into consideration competition policy, like the concession granted on December 17, 2002, to Radiomóvil Dipsa, S.A. de C.V. (Telcel), to operate a public telecommunications net, nevertheless it's the cellular telephone company belonging to the same economic group as Telmex, which, as been said, has substantial power in five basic telecommunications markets.

In these and other cases the Commission must advocate¹⁰ with authorities and legislative powers to persuade them about the benefits of competition process and free market access. For example, seeking an institutionalized co-ordination mechanism between the Commission and sector regulatory agencies. In legislative matters, previous binding consultation from the Commission in competition matters could be implemented.

On the other hand, the competition policy's scope must include authorities and governmental entities, legislative powers and the judicial system, economic agents, the education system, and the public in general, promoting the development of a culture for competition and increasing the awareness of the possibility of obtaining goods and services at a cheaper option with better quality, and at the end, enhancing the economy.

10. "Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition", *Advocacy and Competition Policy*, Report prepared by the Advocacy Working Group, ICN's Conference, Naples, Italy, 2002; p. 25.