

THE ECONOMIC SIGNIFICANCE OF COMPETITION LAW IN MEXICO:

A REVIEW OF RECENT STATUTORY REFORMS AND THE ROLE OF THE JUDICIARY

By: Elizabeth Pocock

I. THE ECONOMIC IMPORTANCE OF COMPETITION LAW

The presence of a strong and fair competition law plays an important role in economic growth and efficiency. Competition between enterprises is a crucial component to keeping prices consistent with the actual cost involved with a good or service. Firms that are openly competing for the right to a consumer's business will respond to changes in the marketplace reasonably and consumers will be able to make more informed decisions when purchasing. While the perfect competition environment would be one in which "firms are so numerous that none of them are large enough to influence prices by altering output and all act independently,"¹ this is rarely the case. Enterprises are not always the same size and historically have taken actions to control market areas to increase capital. To regulate and discourage this type of activity, countries all over the world have introduced various forms of competition policy.

As defined by the UN Conference on Trade and Development's Model Law on Competition, the objective of competition law is "to control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power."² The introduction of competition into a market place allows sectors of the economy to become more productive and consumers

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¹ Einer Elhauge and Damien Geradin, *Global Antitrust Law and Economics* (New York: Foundation Press, 2007), 1.

² United Nations Conference on Trade and Development, "Model Law on Competition," (United Nations Conference on Trade and Development, TD/RBP/CONF.5/7/Rev., 2007): Art. 1. http://www.unctad.org/en/docs/tdrbpcnf5d7rev3_en.pdf

to increase their overall standard of living.³ As cited by Angel Gurría, the Organization for Economic Co-Operation and Development (OECD) Secretary-General in a presentation on the OECD's Competition Assessment Toolkit in 2007, there is ample empirical evidence that reducing restriction to competition in product markets promotes productivity, growth, investment, employment and innovation.⁴ In addition, the presence of a strong competition law can be a catalyst for attracting foreign investment and trade and can be an important tool to a country when recovering from an economic crisis.⁵

A. MEXICO'S ECONOMIC SITUATION

As identified by the Inter-American Development Bank (IDB), Mexico has enormous potential for accelerated growth. Mexico is a party to multiple commercial treaties that include over 42 countries, has the world's third largest quantity of fresh water resources, the world's ninth-largest oil reserve, and shares a border with the largest economy in the world.⁶ However, as stated by Angel Gurría in his 2007 speech about Mexico, despite Mexico's many achievements within the area of competition law, it still faces many major challenges.⁷ Studies conducted by the OECD show that while in theory almost all areas of the economy should be open to competition, there are large areas of Mexico's economy that still involve no real competing firms and therefore no customer advantage.⁸

While Mexico has made considerable progress towards liberalizing its economy and obtaining macroeconomic stability, if Mexico wants to experience economic success and increase incentives for entrepreneurship to occur, it must continue to actively improve its competition law and policy.⁹ It is

³ Organization for Economic Co-Operation and Development, "Regulation and Industry Sectors," (Organization for Economic Co-Operation and Development), www.oecd.org/competition/industrysectors, (accessed January 12, 2012).

⁴ Angel Gurría, "Competition: The Rule of the Game," (Presentation of the Competition Assessment Toolkit, Mexico City, June 14, 2007). http://www.oecd.org/document/52/0,3746,en_33873108_33873610_38822196_1_1_1_1,00.html

⁵ Organization for Economic Co-Operation and Development, "Regulatory Reform for Recovery: Lessons from Implementation During Crises," (Organization for Economic Co-Operation and Development, 2011): 163-168. <http://www.oecd.org/dataoecd/48/25/44955878.pdf>.

⁶ Verónica Baz and others, "Productive Development Policies in Latin America and the Caribbean: The Case of Mexico," (Inter-American Development Bank Working Paper Series IDB-WP-168, 2010): 5. http://www.iadb.org/en/research-and-data/publication-details,3169.html?displaytype=&pub_id=IDB-WP-168

⁷ Gurría, "Competition: The Rule of the Game."

⁸ *Ibid.*

⁹ Baz, 5.

anticipated that if Mexico can address some of the issues identified by the OECD and strengthen the presence of competition in important sectors such as electricity, oil, gas extraction, and telecommunications, the effects could be substantial for the Mexican economy.¹⁰

However, current obstacles within Mexico's law and institutional framework are preventing this from happening. These include: 1) deficiencies in statutory authority granted to the competition authority; 2) judicial review procedures and interpretations that have limited the effectiveness of that same authority; and 3) the reservation of certain state monopolies by the Mexican Constitution.¹¹ As will be discussed below, some of these issues are at least partially addressed within the recent 2011 reforms to the law and improvements are anticipated, yet other issues remain untouched and may continue to impede Mexico's development.

II. THE HISTORY OF COMPETITION LAW IN MEXICO

Mexico introduced its first competition policy in the early 1990s. The introduction of the reform effort came at a time when the Mexican government was concerned with the protection of domestic economic activity by developing a market-based economy to replace central government control.¹² As the government privatized hundreds of previously state-owned enterprises, it sought to create a law that would ensure private barriers to competition did not arise in place of central government control.¹³ The first competition policy was published on December 24, 1992 and entered into force on June 22, 1993, as the *Ley Federal De Competencia Económica* (LFCE) or the Federal Law of Economic Competition.¹⁴

¹⁰ Gurría, "Competition: The Rule of the Game."

¹¹ Oliver Solano and others, "Challenges to the Effective Implementation of Competition Policy in Regulated Sectors: The Case of Telecommunications in Mexico," *Northwestern Journal of International Law and Business* 26, (2006): 527.

¹² Organization for Economic Co-Operation and Development, "Competition Law and Policy: A Peer Review," (Organization for Economic Co-Operation and Development, 2004): 11. <http://www.oecd.org/dataoecd/57/9/31430869.pdf>

¹³ As a party to the North American Free Trade Agreement, Mexico was also required to adopt some form of competition policy. See North American Free Trade Agreement, Art. 1501(1). "Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto..."

¹⁴ *Ley Federal De Competencia Económica* (Mexico's Federal Law of Economic Competition) [hereinafter LFCE], English version of original 1992 text of LFCE available from the United Nations Convention on Trade and Development at http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb_ncl_mexico_en.pdf

A. THE SCOPE OF THE LAW'S APPLICATION

At the time of implementation, the LFCE was modeled after the best international practices and based mostly on United States antitrust law.¹⁵ Domestically, it set out to implement Article 28 of the Mexican Constitution that states broadly that there “shall be no monopolies of any kind” in Mexico.¹⁶ Therefore, the LFCE is generally meant to apply to “all economic agents,” including government agencies,¹⁷ and to “all sectors of economic activity.”¹⁸

However, while the Constitution attempts to remain broad in the applicability of the LFCE, it also creates exceptions to the broad rule and created specific instances in which competition law does not apply. Of significant importance is the Mexican Constitution's reservation government's right to have exclusive control over certain specified “strategic areas” of enterprise.¹⁹ These reservations not only include the standard governmental powers of mail delivery and currency production but also include the more controversial reservations of control over electricity, oil, and gas extraction.²⁰

Even though it can be argued that some of these areas should remain in government control for public policy reasons, the privatization of others has the potential to be enormously beneficial for Mexico's economy. For privatization in these industries to occur, Mexico requires an amendment to the actual list contained in Article 28 of the Constitution. While amendments to Mexico's Constitution are not uncommon in Mexico's history, the likelihood of an amendment regarding as sensitive of an issue as Article 28 under the current divided government is slim.²¹

¹⁵ Antitrust Working Group of the ABA Mexico Committee, “Legislative Reform, Merger Notification Thresholds and Immunity Guidelines,” (American Bar Association, Section of International Law, International Antitrust Committee: The Newsletter April 2010), <http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/NewsletterApril2011.pdf>

¹⁶ Mexican Constitution, Art. 28. English version available from the Organization of American States at http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf

¹⁷ LFCE, Art. 3.

¹⁸ LFCE, Art. 1.

¹⁹ Organization for Economic Co-Operation and Development, “Competition Law and Policy: A Peer Review,” 15.

²⁰ Mexican Constitution, Art. 28.

²¹ See Organization for Economic Co-Operation and Development, “Competition Law and Policy: A Peer Review,” 15, for an explanation of the amendment process, “The list may be contracted only by constitutional amendment, which requires a two-thirds majority of both houses of Congress as well as approval by a majority of the state legislatures. Congress can expand the list simply by enacting legislation, provided that the basis for ascribing “strategic area” status is duly established.”

B. THE COMPONENTS AND COVERAGE OF THE LAW

In implementing the Constitution and its desire to place a ban on monopolies and anti-competitive behavior, the LFCE seeks not to make monopolies illegal, but instead to prosecute and penalize practices by which monopoly power might be strengthened or attained. As expressly stated in Article 2 of the LFCE the policy objectives of the law are: “to protect the competitive process and free market access by preventing monopolies, monopolistic practices, and other restraints of the efficient functioning of markets for goods and services.”²² In doing so, the LFCE classifies practices into one of two categories, absolute or relative.²³

Absolute practices, as defined by LFCE Article 9, are the type of monopolistic practices that are automatically legally void and that can never be considered efficient. Absolute practices come in the form of horizontal agreements that occur between competitors in the same market and involve situations of cartels, collusion, conspiracy, and certain mergers.²⁴ The LFCE identifies four definite categories of hard-core horizontal agreements that are subject to per se prohibition under Mexican law. These include price fixing agreements, output restriction, market division, and bid rigging.²⁵

In contrast to absolute practices, relative monopolistic practices are only illegal if the firm is determined to have substantial power in a specific market and cannot prove the practice is efficient.²⁶ In other words, there must be some demonstrable harm to competition for action to be taken against relative practices. They are often the result of vertical agreements that occur between participants at various levels of the market (i.e. a supplier and manufacturer).²⁷ While parties to these agreements may not be in direct competition, the agreements they enter into can have a drastic effect on competition within their industry. LFCE Article 10 specifically identifies various types of vertical conduct including: predatory pricing, price

²² LFCE, Art. 2.

²³ LFCE Art. 9 & 10.

²⁴ Organization for Economic Co-Operation and Development, “Glossary of Industrial Organization Economics and Competition Law,” (Organization for Economic Co-Operation and Development, 1992): 12. <http://www.oecd.org/dataoecd/8/61/2376087.pdf>

²⁵ LFCE, Art. 9.

²⁶ *Ibid.* stating relative practices are illegal only if they “improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favor of certain persons.”

²⁷ Organization for Economic Co-Operation and Development, “Glossary of Industrial Organization Economics and Competition Law,” 12.

discrimination and resale price maintenance; exclusive dealing and refusals to deal; exclusive dealing in exchange for special discounts; sale conditions or tied sales; vertical market division; and raising rivals' costs.²⁸

In addition to defining the types of practices that are classified as anti-competitive, the LFCE includes various other sections helpful in determining the overall goal of the law. These provisions address items such as: the definition of terms contained with the law, the criteria for reviewing potential monopolistic activities, the procedural components that should be followed during an investigation, and the types of punishment and prohibition that can be imposed.²⁹

C. THE REGULATING AGENCY

Recognizing the need for a separate regulating agency to manage the new competition law and its enforcement, Article 23 of the LFCE also set about to create the *Comisión Federal De Competencia México* (CFC) or Federal Competition Commission. The CFC is “technically and operatively autonomous” and acts as the sole agency responsible for applying Mexico’s competition law.³⁰ The CFC is composed of five commissioners, including one Chairman, who are removable only by cause and who are elected for staggered ten-year terms of office.³¹ This format is meant to ensure that the Commission remains immune to complete personnel turnover arising after the election of a new Mexican President.³² The five commissioners make up the decision-making authority of the CFC and decide issues by majority vote. The tasks of the CFC include removing clear concentrations of power in markets, punishing monopolistic practices, issuing binding opinions, and attempting to prevent monopolies through investigation.³³

²⁸ LFCE, Art. 10.

²⁹ LFCE, Generally.

³⁰ LFCE, Art. 23.

³¹ Global Competition Review, “The Handbook of Competition Enforcement Agencies 2011: Mexico’s Federal Competition Commission,” (Global Competition Review, 2010): 197.

<http://www.globalcompetitionreview.com/handbooks/35/sections/123/chapters/1314/mexico/>

³² Organization for Economic Co-Operation and Development, “Competition Law and Policy: A Peer Review,” 36.

³³ Comisión Federal De Competencia México, “Who Are We? And What We Do?,” Comisión Federal De Competencia México <http://www.cfc.gob.mx/index.php/en/Inicio> (English version), (accessed January 12, 2012).

III. CHALLENGES FACING EFFECTIVE IMPLEMENTATION

A. STATUTORY AUTHORITY

While the intention of the Mexican government was to give the CFC independence and power to regulate competition law, certain deficiencies in statutory authority and judicial review processes have often impeded the CFC's efficiency. As mentioned by CFC President Eduardo Pérez Motta in a speech commenting on the developments of competition policy in Mexico delivered at the 2007 Conference for the International Competition Network, despite reform efforts, "distortions in specific regulated sectors are still widespread, and economic policy is not always geared towards competition."³⁴

According to Motta, while "the CFC has conducted great efforts to improve competition and efficiency on these sectors through the issuance of opinions and policy recommendations" the CFC still has areas in which its regulations are failing.³⁵ One particular limiting factor in the CFC's success relates to its previous lack of authority to make unannounced searches into business records during investigations. Instead, the CFC was forced to request documents in advance and to give prior notice that it would be arriving to inspect the premises.³⁶ While this, in part, is related to certain due process rights guaranteed to Mexican citizens by their Constitution, Article 16 of the Constitution actually allows for such searches provided they meet certain criteria.³⁷ However, the Mexican Attorney General has historically brought challenges against any new laws that authorize such searches, claiming they are an over-extension of administrative powers.

Another historically limiting aspect of the statutory law of the CFC was the lack of defined leniency terms granting immunity from penalties to those individuals that reveal collusive behavior. While at times the CFC provided those cooperating with some relief from punishment, no guidelines ever existed to say

³⁴ Eduardo Pérez Motta, "Current State of Competition Policy in Mexico," (Comments presented at International Competition Network Sixth Annual Conference, Moscow, Russia, May 30-June 1, 2007), <http://www.internationalcompetitionnetwork.org/library.aspx?search=mexico&group=0&type=0&workshop=0>

³⁵ *Ibid.*, see also for a list of regulated economic areas in which the CFC has made progress and issued resolutions or opinions.

³⁶ Antitrust Working Group of the ABA Mexico Committee, 4.

³⁷ Mexican Constitution, Art. 16.

when this would happen and what level of information was needed to be granted relief.³⁸ Lastly and most significantly, the CFC has previously lacked the ability to impose large fines or criminal charges on those found to be guilty of engaging in anti-competitive behavior. The inability to impose harsh enough punishments results in the powerlessness of even successful decisions in deterring current or future behavior.

B. JUDICIAL REVIEW

In addition to challenges involving the statutory powers granted to the CFC for investigation and enforcement, many issues pertaining to the role of judicial review in the effectiveness of CFC decisions have impeded Mexico's progress in the area of competition policy. Judicial interpretation of the competition law has ultimately limited the role and scope of the CFC and its effectiveness at regulating firm behavior. These limitations have occurred in a variety of ways. First, because the Mexican judiciary has lacked specialization in competition issues and knowledge of competition policy objectives, the CFC has historically functioned as an administrative tribunal, issuing its own decisions and recommendations.³⁹ However, any firm involved in a Commission case still has various opportunities to appeal if they are unhappy with the decision issued by the CFC. Initially, the firm can appeal to the CFC directly. In the event that the CFC denies their appeal, then the firm has the option of using the traditional Mexican legal concept of the *amparo* to bring an action in federal district court or the option of bringing an appellant action in the Court of Fiscal and Administrative Justice.

Of particular concern to the success of the CFC is the option of the *amparo*. Generally, an *amparo* is a constitutionally guaranteed right, similar to an injunction, that can be used by any party to assert they have been subjected to an unconstitutional statute or have not been awarded proper due process by the act of a government authority.⁴⁰ While originally intended to be mechanism for checks and balances, in cases of

³⁸ Antitrust Working Group of the ABA Mexico Committee, 5.

³⁹ Angel Calderón and Dwight Dyer, "The Political Economy of Productivity in Mexico," (Inter-American Development Bank Working Paper, 2009): 25. <http://www.iadb.org/document.cfm?id=1958298>

⁴⁰ Organization for Economic Co-Operation and Development, "Competition Law and Policy: A Peer Review," 44.

competition law, *amparos* have been used by firms to delay CFC procedures and resolutions, and avoid enforcement of the CFC decisions.⁴¹

Methods employed by firms to attack CFC actions allege a variety of factors including the assertion that the entire LFCE is unconstitutional on its face or as applied, or that there was an error in the final decision issued by the CFC.⁴² More specifically, firms have challenged everything from fines imposed for failure to comply with discovery orders, to demands issued at various phases of investigation.

Since *amparos* may be granted by any federal civil judge, firms essentially present their cases before judges with limited backgrounds in competition issues. Even though the Commission has often been successful in *amparos* that actually reach the level of the Mexican Supreme Court, district courts continually rule against the CFC on various issues.⁴³ Most decisions against the CFC have to do with procedural issues, allowing the judiciary the opportunity to steer clear of having to make any decision based on the substantive competition issues. For firms, the *amparo* court system is seen as an easy way to delay the CFC and they will often bring multiple *amparo* actions for different issues within the same alleged violation, with result having the potential to be tied up for years in the court.

An excellent example of the effect of judicial review on the work of the CFC is evident by a recent Telmex case. Beginning in 1998, the CFC determined that Telmex was a dominant player in multiple telecommunications markets. In response to the ruling, Telmex filed multiple *amparos* citing various violations of procedural due process by the CFC and managed to delay the ruling until 2006. When the court finally ruled on the case almost eight years later, it determined that the circumstances in the original CFC ruling were no longer valid and extended protection to Telmex.⁴⁴

Again in 2010, the CFC found that Telcel, a brand operated by Telmex, had substantial power in the market for mobile telephone services, leading the market with four times as many customers and five times

⁴¹ Solano, 538.

⁴² Organization for Economic Co-Operation and Development, "Competition Law and Policy: A Peer Review," 45.

⁴³ *Ibid.* at 46.

⁴⁴ Calderón, 14.

as much revenue as its closest competitor.⁴⁵ In response to the decision, Telcel filed an appeal before the CFC for reconsideration and the CFC subsequently rejected all of Telcel's motions based on lack of standing.⁴⁶ Telcel then filed a motion before the court alleging a contradiction of criteria concerning previous judicial opinions heard as *amparo* cases regarding the element of a firm's standing in front of the CFC. In August 2011, the Supreme Court ruled for Telcel, determining that firms have standing to file a motion for reconsideration.⁴⁷ While the Supreme Court's decision will hopefully resolve the inconsistencies created by lower courts, the problems created by the *amparo* process are obvious.

As evident by the second Telmex case, in addition to delay of resolution and the expiration of circumstances, the CFC faces many procedural concerns when a decision of theirs becomes subject to judicial review. Another illustration of a situation involving issues of judicial review and their effect on the enforceability of CFC decisions or sanctions has been the constant regulation of Coca Cola by the CFC. During its existence, the CFC has found that exclusive dealing contracts in the beverage distribution industry are a reoccurring issue in Mexico. Beginning in 2000, the CFC commenced an investigation of contracts between Coke and thousands of small retail outlets under the request of a complaint from PepsiCo and two other Mexican soft drink companies.⁴⁸

The stores in question absolutely limited themselves to selling Coke brands in exchange for free refrigeration units or store signs from Coca Cola. In 2002, the CFC determined that these contracts were unlawful and that Coca-Cola had engaged in monopolistic practices and imposed a fine of around US\$840,000.00 as punishment.⁴⁹ On June 9, 2010, the Supreme Court granted constitutional relief within an *amparo* suit to Coca-Cola against the decision by the CFC. The Supreme Court ordered the CFC to retract its

⁴⁵ Javier Martinez Del Campo L, and others, "Mexico's Competition Commission Determines that Telcel has Market Power in Mobile Telephony," (Jones Day Publications, March 2010), <http://www.jonesday.com/mexicos-competition-commission-determines-that-telcel-has-market-power-in-mobile-telephony-02-23-2010/>

⁴⁶ Lucia Ojeda Cárdenas, "Supreme Court on challenges to FCC determinations," (International Law Office Newsletter, October 2011), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=48890ffb-82f9-4561-a279-4cf727d684a8>

⁴⁷ *Ibid.*

⁴⁸ Coca-Cola Case decision available in Spanish at <http://www.scjn.gob.mx/Micrositios/unidadcronicas/Sinopsis%20de%20Asuntos%20destacados%20de%20las%20Salas/1S-090610-JRCD-2127.pdf>

⁴⁹ Organization for Economic Co-Operation and Development, "Competition Law and Policy: A Peer Review," 22.

first decision and issue a second one in its place on the basis that did not properly admit or access evidence submitted by Coca-Cola during the proceeding.⁵⁰ Essentially, the CFC will have to re-evaluate the entire case if they wish to pursue the behavior of Coca-Cola any further.

The Telmex and Coca-Cola cases are just a few examples of issues arising as a result of the lack of experience judges face with regards to economic and competition policy. It is clear from these illustrations that reform to the judicial process of review of CFC decisions is necessary for the implementation of an efficient and effective competition law, however the presence of a guaranteed right of *amparo* may hinder new reforms.

IV. MEXICO'S LEGAL REFORM EFFORTS

A. PREVIOUS REFORM EFFORTS: 2006

In 2006, the Mexican government attempted to reform the LFCE to respond to some of the issues presented by the original law and clarify the CFC's procedures, ultimately adding legal certainty.⁵¹ Specifically, the 2006 reforms were intended to upgrade and increase monetary and non-monetary sanctions to align more closely with international standards, create an easier administrative merger review process, and create a leniency and special procedure program for the settlement of some types of cases.⁵² While the reforms did give the CFC more legal instruments to use for enforcement, practical and legal issues emerged after their introduction.

One such issue was the initiation of a lawsuit by the Mexican Attorney General's office to have multiple provisions of the reform declared unconstitutional by the Mexican Supreme Court. In particular, the court declared that the involvement of the Senate in selecting the commissioners was unconstitutional and the requirement of the Commission to issue an annual report to Congress was not a necessary obligation.⁵³

⁵⁰ Lucía Ojeda Cárdenas, "Antitrust – A Year in Review 2010: Mexico," (American Bar Association, Section of International Law, International Antitrust Committee, 2010): 115.

<http://meetings.abanet.org/webupload/commupload/IC722000/newsletterpubs/ABA2010AntitrustYearInReview.pdf>

⁵¹ Motta, "Current State of Competition Policy in Mexico."

⁵² Antitrust Working Group of the ABA Mexico Committee, 4.

⁵³ *Ibid.*, 5.

In contrast, the court ruled that the Commission could make investigations of companies' premises and enact its own ruling to dissolve a company for abuse of dominance without obtaining a court order as long as they maintained appropriate behavior under Article 16 of the Constitution.⁵⁴ That being said, this power of investigation was limited by requirements of the statute and the 2006 reforms still failed to grant the CFC enough power to effectively apply large enough sanctions to deter anti-competitive behavior and failed to address the issue of judicial review and court rulings.⁵⁵

B. CURRENT (2011) REFORM:

Based on the complaints that arose after the limited success of the 2006 law reforms and the downturn of the global economy, the Mexican government approved a new reform that entered into effect on May 10, 2011.⁵⁶ The reform amends, supplements, and repeals various provisions of the LFCE, the *Código Penal Federal* (Federal Penal Code) and the *Código Fiscal de la Federación* (Federal Tax Code) and has several important aspects that should have a tremendous effect on the CFC's ability to enforce competition law within Mexico.⁵⁷

1. Increased Statutory Authority

In response to the issues previously mentioned regarding the CFC's lack of statutory authority, the reform includes several attempts to remedy these problems.⁵⁸ Perhaps most importantly, the new reforms introduce new penalties for those found to have engaged in monopolistic practices. The reform now authorizes the CFC to impose monetary sanctions up to a certain percentage of a violating firm's income for the following infractions: ten-percent for absolute practice violations, eight-percent for relative practice violations, five-percent for failing to notify the CFC of a concentration when required, and eight-percent for

⁵⁴ *Ibid.*

⁵⁵ Calderón, 26.

⁵⁶ LFCE 2011 Reform, (May 10, 2011). For the full text of the reform (in Spanish) see http://www.diputados.gob.mx/LeyesBiblio/ref/lfce/LFCE_ref03_10may11.pdf

⁵⁷ Alberto De La Peña, "Changes in Mexican Antitrust Law," (Haynes Boone Antitrust Alert, May 17, 2011), http://www.haynesboone.com/files/Publication/ab8deab3-1b12-498a-bc5c-d96e195f332c/Presentation/PublicationAttachment/87d04d24-d16d-42b9-be5c-e29b69422bbc/Changes_in_Mexican_Antitrust_Law.pdf

⁵⁸ Mexico's Ministry of the Economy, "Emergence of a New Competition Law in Mexico," (NAFTA Works Vol. 16 Issue 5, May 2011), <http://www.naftamexico.net/may-2011-emergence-of-a-new-competition-law-in-mexico/>

failing to comply with an order.⁵⁹ Additionally, the CFC may now also impose criminal sanctions of three to ten years of imprisonment on certain individuals found responsible for firms' absolute monopolistic behavior.⁶⁰

The reform also contains a revision granting the CFC the authoritative power to make site inspections without a prior judicial order.⁶¹ As mentioned above, this is something the CFC has constantly struggled with when investigating firms in the past. In accordance with Article 16 of the Constitution, the new amendment sets forth rules that must be closely followed by the CFC when making inspections, including that the inspection order contain the object, scope, and duration of the inspection.⁶² It is yet to be seen whether the Mexican Attorney General will again challenge this new right of the CFC as a violation of due process.

The CFC has also been granted the new authority to issue a temporary suspension of conduct during an investigation that they have determined will likely lead to the discovery of a monopolistic practice or prohibited concentration.⁶³ The temporary suspension appears to function almost as an injunction, but allows the CFC to set bonds allowing the firm to avoid or lift the suspension while the investigation is still pending. Again, the Mexican Attorney General may attempt to challenge these temporary injunctions against firm behavior as violations of due process.

Other noteworthy concepts introduced within the amendments include the ability of the CFC to rely on the concept of "combined substantial power" during market analysis and the streamlined process for merger review.⁶⁴ A faster and more transparent merger review process has potential to attract more foreign investment and allows firms struggling as a result of the economic crisis the ability to restructure before it is

⁵⁹ Javier Martinez Del Campo L. and others, "Mexico Antitrust Authority Given Greater Powers," (Jones Day Publications, June 2011), <http://www.jonesday.com/antitrust-alert--mexico-antitrust-authority-given-greater-powers/>

⁶⁰ *Ibid.*

⁶¹ Lucia Ojeda Cárdenas, "Amendments Stress Need for Effective Implementation," (International Law Office Newsletter, June 2, 2011), <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=8278f930-975d-491b-bbe6-e903eb3a79af>.

⁶² *Ibid.*

⁶³ Campo, "Mexico Antitrust Authority Given Greater Powers."

⁶⁴ Cárdenas, "Amendments Stress Need for Effective Implementation."

too late. The introduction of the concept of “combined substantial power” will now allow the CFC to consider two or more agents as exercising dominance in the same market, something that could be important in resolving some of the competition issues in some of Mexico’s more concentrated industries, such as the telecommunications field.

2. The New Role of the Judiciary

One of the most interesting reforms introduced in the amendments addresses the issue of judicial review and the appeals process that will now be used if parties have a complaint about a decision issued by the CFC. As stated by various experts since the implementation of Mexico’s first competition law in 1993, the creation of a specialized competition court to handle antitrust issues has the potential to greatly assist the CFC in becoming a truly efficient agency in enforcing the law.⁶⁵ The 2011 Amendments to Article 39 of the LFEC set out to accomplish this goal.

The relevant portion of Article 39 now states:

The ordinary administrative process before the District Courts and Tribunals specialized in competition is available for claims against final decisions when the administrative action is produced. With regard to the above-mentioned decisions, an affected party will have the option to initiate an ordinary administrative process or an appeal for reconsideration; against a decision issued in the latter, an ordinary administrative process may proceed. The term to file a claim for an ordinary administrative process will be of 30 days after being notified of the relevant decision.⁶⁶

The Amendment acts to create an ordinary administrative trial before the District Courts and specialized Tribunals in the area of competition law and antitrust.⁶⁷ In addition, the aggrieved firm now has the option to bring such an action before or after the administrative appeal. Cases will be heard by specialist judges and courts that specialize in competition matters (or soon will after they participate in training). In addition to Article 39, the LFCE reform established the issuance of a 180-day period to create such trial

⁶⁵ Organization for Economic Co-Operation and Development Secretariat, “Institutional Challenges in Promoting Competition,” (Inter-American Development Bank Second Annual Meeting of the Latin American Competition Forum, June 14-15, 2004): 4. <http://www.oecd.org/dataoecd/52/41/32033728.pdf>

⁶⁶ LFCE 2011 Reform, Art. 39. Translation from original Spanish text courtesy of Cristina Castaneda, Project Manager at the National Law Center for Inter-American Free Trade.

⁶⁷ Cárdenas, “Amendments Stress Need for Effective Implementation.”

procedures and the special antitrust Tribunals meaning the rules for the new procedure should be ready by mid-December 2011.⁶⁸

While the creation of the new court is meant to solve a number of the previous issues apparent within the judicial review process, firms are still guaranteed the constitutional right of *amparo*. If firms still have the ability to bring *amparo* suits in any federal civil court, the creation of a specialized competition section may not make any difference. However, if it is determined that a firm's constitutional right is being upheld by allowing the *amparo* suit to be heard only in the new court, the problem may be avoided or at least mitigated. Until the issuance of the new trial procedures and the progression of the first appeal takes place, it is too soon to tell what the true result of the new specialized court will be.

C. PROPOSED OUTREACH FOR SUCCESSFUL IMPLEMENTATION

In an effort to take advantage of the new reforms at its disposal, the CFC is initiating various outreach methods to ensure the law is successfully implemented across various markets. The CFC is pursuing methods to increase transparency and using this as a time to improve both its own public image and the image of competition law in general.

When examining the CFC's public image, it is important to remember that the overall number of cases handled and investigated by the CFC each year is not overwhelming. In 2010, the CFC initiated a total of four investigations on absolute practices and seven concerning relative monopolistic practices.⁶⁹ Likewise, in 2011 the CFC conducted again only four absolute practice investigations and six relative practice investigations.⁷⁰ The limited number of appearances of the CFC in the public eye could be one reason why the public does not recognize the CFC as protecting their interests.

⁶⁸ At the time of this articles submission (January 2012) the procedure was not yet available.

⁶⁹ Cárdenas, "Antitrust – A Year in Review 2010: Mexico."

⁷⁰ Lucía Ojeda Cárdenas, "Antitrust – A Year in Review 2011: Mexico," (International Law Office Newsletter December 15, 2011), <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=4bee7196-20d3-4038-a1a7-c800b292cdd0>

A possible remedy to this problem is Mexico's new 2011 amendments to the Federal Civil Code allowing for class action suits due to enter into force in March 2012.⁷¹ Under the code, consumers will now have the ability to pursue class action remedies based on the monopolistic practices identified by the CFC. Now that consumers have a possible remedy for damages, they may begin to pay more attention to the actions of the CFC and the CFC may gain a more favorable public image.

While not necessarily resolving their presence as a possible area of consumer protection, the CFC is making efforts to improve its transparency and image within the business world. One component of this outreach is the issuance of 'Guides, Guidelines, and Criteria' by the CFC so that practitioners and involved parties can have a better understanding of the procedures involved in competition law.⁷² These guides were prepared by the CFC themselves, with the assistance of various members of the United States Federal Trade Commission and other outside economic experts and are available on their online website.⁷³

In addition to creating guidelines for parties that have the potential to be involved in competition cases, the CFC is also moving forward to help assist in the specialized training of the judiciary on competition law. While the CFC has intended to implement a training of this type for many years, it was not until the creation of the specialized court of review under Article 39 of the new reform that the judiciary showed any interest. The CFC will be receiving assistance from the Mexico office of the United States Agency for International Development (USAID), ABT Associates and from the National Law Center for Inter-American Free Trade, a non-profit research and educational institution with extensive experience designing and implementing training programs for the judiciary within Mexico.⁷⁴ It is hoped that the first of these training programs will occur in the first half of 2012.

⁷¹ *Ibid.*

⁷² Comisión Federal De Competencia México, "Guías, Lineamientos y Criterios," Comisión Federal De Competencia México, <http://www.cfc.gob.mx/index.php/guiasCFC> (in Spanish), (accessed January 12, 2012).

⁷³ *Ibid.*

⁷⁴ National Law Center for Inter-American Free Trade, www.natlaw.com (accessed January 12, 2012).

The idea is to design a skill-based training that can be offered to the federal judiciary on the technical issues involved in the area of competition policy. Training sessions will review the recent amendments to the LFCE and discuss why competition is important for the Mexican economy. It is expected that judges will greatly benefit from these training programs and that, upon completion, the judges will be more comfortable when presented with competition policy issues and economic concepts in the courtroom ultimately increasing the efficiency of the CFC.

CONCLUSION

While the future of competition law and policy in Mexico is still unclear, the Mexican government and the CFC are making great strides in attempting to improve the underlying framework. Currently, the implementation of the new reforms is not actually expected until May 2012. Until then, little can be said about their expected effectiveness. There is potential for the Mexican Attorney General to attempt to make similar challenges regarding their constitutionality and also for convicted firms to still use *amparos* to avoid the enforcement of CFC decisions.

In addition to challenges facing the new reforms, there still exist issues within Mexico's overall constitutional framework that will continue to affect competition within Mexico's economy. Of particular importance is the list of reserved governmental powers contained within the Constitution. Until this list is amended, large portions of Mexico's economy will not be subject to competition policy and will therefore remain concentrated to the disadvantage of the consumer.

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