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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN MEXICO

-- 2004 --

This report is submitted by the Mexican Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting (1-2 June 2005).

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1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation

1. In 2004, congressional legislators released 5 different draft amendments related to the following provisions in the Federal Law of Economic Competition (FLEC): (1) two amendments relating to article 10, section VII, to redefine the general case of relative monopolistic practices; (2) articles 14 and 15, to strengthen and make effective the FCC's powers to declare the existence of inter-state trade barriers; (3) articles 23, 25, 26 and 28, to strengthen the FCC's budgetary autonomy; and (4) article 2, to update the name of the Ministry of the Economy. The proposed amendments to articles 10, section VII, 14 and 15 were motivated by the Supreme Court of Justice of the Nation's (SCJN) declaration of unconstitutionality of these articles (further details are included in the section below). In addition, there was an proposal to do away with the entire FLEC and in its place enact the Federal Law of Economic Competition and Competitiveness that, among other, proposed to eliminate merger control. None of these bills have been approved or enacted by Congress.

2. At request of the Ministry of Economics and the Ministry of Government, during the early stages of the legislative process, the Federal Competition Commission (FCC or Commission) issued opinions on the six proposals described above. Opinions were, in turn, presented before the legislative.

3. Supreme Court decisions about the constitutionality of three competition law articles

4. In 2004, once two judicial procedures had concluded, the SCJN studied and resolved on the constitutionality of articles 10 index VII, 14 and 15 of the FLEC as follows:

5. The SCJN considered that section VII of article 10 of the FLEC was unconstitutional since it only addresses general criteria on conducts that can hinder free market access and economic competition, and it fails to establish the parameters that the FCC must follow in order to sanction the relative monopolistic practices contained in that index.¹

6. The SCJN declared articles 14 and 15 of the FLEC unconstitutional on grounds that they allowed the FCC to interfere with attributions that the Constitution conferred to states' executive and legislative branches. The SCJN also concluded that the Constitution does not empower Congress to issue a secondary law, that is, the FLEC, to investigate, direct or supervise the public activities of any state government and that these attributes are reserved for the judicial branch.²

1.2 Other relevant measures, including new guidelines

1. In 2004, the Mergers directorate published new guidelines and economic analysis notes. The Guidelines describe the Commission's procedures to resolve merger notifications. Their objective is to give the Commission's acts transparency and to fulfil its compromise of implementing the Recommended Practices issued by the International Competition Network (ICN). The Guidelines consist of two parts. The first describes how the law is applied and the notification thresholds included under each of the three indices in article 20 of the FLEC. The second part details how the Commission calculates analysis and resolution

¹ FCC vs. Embotelladora Argos, SA de CV (DE-06-2000 which includes complaints against other firms belonging to Grupo Coca Cola in Mexico).

² FCC vs. Government of the state of Durango. (DE-12-1997 and RA-21-1998).

timelines when reviewing a merger notification, and how information should be submitted to the Commission in order to comply with articles 21 of the FLEC and 17 and 20 of its Code of Regulations (RFLEC). The accompanying economic notes issued by the FCC describe aspects of economic analysis that are required in order to evaluate a merger according to articles 17, 18, 12 and 13 of FLEC and its correlated Code of Regulations. Both documents can be accessed through the FCC's website:

<http://sp.cfc.gob.mx:8080/cfc01/Documentos/cfc99e/Difusi3n/Guía%20de%20Concentraciones/index.htm>.

2. On September 14th 2004 the Plenum emitted its 18th criterion, regarding manifestations emitted by other authorities about possible acts against economic competition and free market access. An excerpt is included here:

7. Manifestations made to this Commission by other authorities regarding possible acts against economic competition and free market access, should contain the elements established under article 24 of the Code of Regulations of the Federal Law of Economic Competition, in order to be treated as a complaint. Failure to do so will lead this Commission to not take account of such manifestations as facts. Fact manifestations will be submitted for the Plenum's consideration, who, if viable, will determine whether to start a preliminary ex-officio investigation.

1.3 Government proposals for new legislation

8. In 2004, the FCC issued opinions on 4 proposals to amend the following sectoral regulations:

- Law of Industrial Property (LIP), proposal to include minimum distances (geographic market segmentation) as a mandatory requirement for franchise contracts;
- Law of Games with Bets and Draws (LGBD), proposal to define certain vertical agreements as *per se* illegal instead of subject to a rule of reason analysis as established in the FLEC;
- Law of Radio and Television (LRT), proposal to include the FCC's favourable opinion in concession-granting procedures and to impose spectrum caps per economic agent in the sector;
- Law of Credit Institutions (LCI), proposal to make mandatory the consultation of the FCC's opinion on tariff basis regulation.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

a) Summary of activities

9. In the period under review, there were 101 investigations underway, 58 had been opened in previous years and 43 were opened during 2004. The FCC concluded 42 files and imposed sanctions in 3 cases involving absolute monopolistic practices (hard core cartels) and in 3 investigations on relative monopolistic practices (vertical agreements). In addition, it issued two recommendations to local authorities involved in two investigations on relative monopolistic practices. In three more cases, the FCC agreed to an early conclusion of the investigation under article 41 of the RFLEC, since responsible parties proposed workable commitments to preserve and/or restore competition. See Annex 1 for further details.

b) *Description of significant cases, including those with international implications*

Phytosanitary laboratory diagnostics³

10. In May 2003, the Asociación Nacional de Tiendas de Autoservicio y Departamentales, AC (ANTAD), brought to the Commission's an allegation of a price agreement in phytosanitary diagnostics services of fresh potato imports. Parties to this alleged price fixing agreement were laboratories authorised to provide these services: Laboratorio de Alta Tecnología de Xalapa, SC (LATEX); Biociencia, SA de CV (Biociencia); Laboratorio de Diagnóstico Fitosanitario, Facultad de Agronomía of the Universidad Autónoma de Nuevo León (LADIF); and Centro Internacional de Servicios Fitosanitarios, SA de CV (CISEF). The laboratories had agreed on a similar price for phytosanitary analysis: three of them on the same day; and the fourth, two days after. The Commission opened an *ex-officio* investigation.

11. During the investigation, the laboratories explained that they had increased their prices as a way of recovering the costs of complying with requirements issued by the Ministry of Agriculture's through its General Directorate of Vegetal Sanity, to implement the Protocol for Exporting Fresh Potato from the United States to Mexico. They alleged that the price coincidence was due to the fact that they had used a similar benchmark when determining their own prices. Nevertheless, they were unable to provide a cost-based justification for their price increase. In addition, the FCC considered that the agreement to fix prices extended to phytosanitary diagnostics services for other vegetables. Based on this information, the Commission summoned the four laboratories.

12. In their replies to the alleged responsibility *officio*, the laboratories committed themselves to restore the violation, establish prices based on the costs of providing the service, and to cease fixing prices in the future for any of their services. In August 2004, the Commission ordered LATEX, Biociencia, LADIF and CISEF to suppress the absolute monopolistic practice immediately, and warned them that in the event of a repeated violation, they would be fined in accordance with the FLEC.

Setting minimum distances between tortilla-makers and other food sellers

13. During 2004, the Commission investigated three cases where municipal authorities and trade associations set minimum distances between businesses in the municipality of Temixco, in the state of Morelos, and the municipalities of Salvador Alvarado and Angostura, in the state of Sinaloa. The conduct violates article 9, index 3 of the FLEC, which bans market allocation agreements among competitors. In addition, the SCJN has established that any regulation setting distance requirements between similar businesses is unconstitutional, since it is contrary to the individual right of freedom of work, contained in article 28, and interferes with free market access.

Temixco, Morelos⁴

14. The *Regulation of Mills and Tortillerías in the Municipality of Temixco, Morelos*, set minimum distance requirements as a condition for tortillería licenses issued by the municipal government. To implement this disposition, the local government agreed with the local Tortillerías and Mills Union, a minimum distance of 500 metres between tortillerías and required that the union issue an approval in order to grant licenses.

³ File IO-09-2003.

⁴ File IO-12-2003.

15. In November 2003, the Commission issued an opinion to Temixco's municipal president expressing the need to modify or eliminate these articles of the regulation which obstructed free market access and unreasonably favoured established businesses. In June 2004, the Commission ordered the Union to immediately suppress its anticompetitive conduct.

Salvador Alvarado, Sinaloa⁵

16. According to the *Regulations for the Opening and Operation of Nixtamal Mills, Tortillerías and Similar Matters*, in Salvador Alvarado, Sinaloa, the municipal authority, empowered to issue licenses for this product, required that a new tortilla establishment would observe a minimum distance of at least 400 metres from another similar establishment, in the downtown area, and 500 metres in the rest of the municipality. To validate that new entrants meet with this requirement, applicants had to obtain a favourable opinion from the municipality's Union of Owners of Nixtamal Mills and Tortillerías. For sales of tortillas in the streets, licences were granted to the closest establishment, or according to the routes defined by the Union, set in a way that did not affect the areas of influence of other operating establishments.

17. During August 2004, the Commission issued an opinion to the municipality of Salvador Alvarado establishing the anticompetitive effects of this regulation, and urging them to prevent geographical market allocation.

Angostura, Sinaloa⁶

18. In March 2003, street vendors of fruits and vegetables brought a complaint against the municipal government of La Angostura, Sinaloa and the Union of Street Vendors of that location. The Commission found that the municipal government and the Union had agreed not to authorise persons from other municipalities to sell their goods in the streets of La Angostura, arguing that the Union could fulfil this activity optimally. As part of the agreement, the Union assigned routes and zones to its members, and the government only issued licenses to members of the Union.

19. In February of 2004, the Commission issued an opinion to the government of La Angostura, advising it to cease actions that obstructed the process of competition and free market access. Regarding the Union, the FCC ordered that it immediately suppress its agreement and warned that if it did not do so, it could result in criminal prosecution.⁷

Relative monopolistic practices in freight railway transportation⁸

20. In November 2001, TFM filed a complaint against its competitor Ferromex, alleging relative monopolistic practices in the interlinear service of freight railway transport in some of the routes it operated. The alleged conduct consisted in: (1) artificially raising its tariffs for interlinear traffic and registering them as the Unique Tariff for Express Freight (TUCE); and (2) charging car hire services twice to increase TFM's costs and to displace it from the market. The effect of these practices was to leave Ferromex as the sole provider of this service along its exclusive routes.

⁵ File IP-09-2004.

⁶ File DE-04-2003.

⁷ Article 24, index III, of the FLEC empowers the Commission to denounce criminal conducts to the Public Minister in matters of competition and free market access.

⁸ Files DE-57-2001 and RA-50-2003.

21. The Commission defined the relevant market as railway lines given in concession to TFM and Ferromex, which, if integrated, created a network that covered a number of cities that had as their interconnection point, the city of Celaya, Guanajuato. In October 2003, the Commission determined that Ferromex was guilty of relative monopolistic practices in violation of the FLEC. These consisted of cost increases for interconnection and transport in several interlinear traffics where the origin railway was TFM, as well as duplicate charges for car hire services.

22. Based on these findings, the FCC ordered Ferromex to suppress its practices and implement corrective measures in the relevant market. These measures consisted in setting interlinear traffic service tariffs per kilometre no higher than the minimum tariff charged by Ferromex to its exclusive route customers, transporting similar products. The FCC also ordered Ferromex to charge car hire tariffs in interlinear traffics no higher than the minimum tariff charged to its exclusive route customers. In February 2004, following an appeal by Ferromex, the Plenum of the Commission resolved that it was unfounded and confirmed its resolution.

Use of vouchers and coupons in self-service stores⁹

23. In September 2000, ANTAD issued a press release informing its members that Prestaciones Mexicanas, SA de CV (Prestamex) had ceased reimbursing vouchers to some ANTAD members, and suggested that all members terminate their contracts with Prestamex. In the same month, the Commission initiated an *ex-officio* investigation to determine whether ANTAD's actions had harmed Prestamex's capacity to compete in the market of distribution and trading of vouchers, coupons, checks, and money orders, exchangeable for goods and services in self-service stores throughout the national territory.

24. In December 2001, the Commission determined that ANTAD was responsible for attempting to unduly displace Prestamex in the relevant market and for establishing exclusive advantages in favour of other suppliers; this relative monopolistic practice violated the FLEC and the Commission fined ANTAD. ANTAD subsequently filed an *amparo* suit,¹⁰ which resulted in the Commission voiding its previous resolution and reinstating its procedure in order to issue another resolution.

25. Following this new resolution, ANTAD presented compromises in order to ensure the protection of the competition process and free market access, which the Commission considered to be appropriate and economically feasible. In August 2004, the FCC accepted the following ANTAD commitments: a) a promise to always comply with the FLEC's provisions and to incorporate them into ANTAD's ethic code; b) an assurance that it would not commit actions that would establish exclusive advantages in favour of certain voucher issuing firms; c) an obligation to publish and publicise a press release aimed at fostering the competition process and free access among consumers, suppliers and members of ANTAD; d) an assurance to file complaints before the FCC about any monopolistic practices in the relevant market; e) an assurance that it would not advise its members to break contracts with voucher issuing firms; and f) a promise not to retaliate against voucher firms nor publicise to its members any problems related with the acceptance of service vouchers.

⁹ File IO-19-2000.

¹⁰ An *amparo* is a proceeding established in the Mexican Constitution to provide all persons with protection against unconstitutional acts by the government. It is available to any party who can raise a claim that he is being subjected to an unconstitutional law or that his due process rights are being infringed. Due process, in this context, is not limited to procedural issues but can attack the merits of an agency's decision.

2.2 *Mergers and acquisitions*

a) *Statistics on number, size and type of mergers notified and/or controlled under competition laws*

26. In 2004, the FCC reviewed 218 merger files, including notifications, complaints and *ex officio* investigations of alleged anticompetitive transactions. Of these, 191 cases were concluded, with only 1 horizontal merger blocked, 3 horizontal mergers were authorised subject to conditions, and 1 vertical merger was conditioned.

b) *Summary of significant cases.*

Comercial Mexicana, Gigante and Soriana: Sinergia¹¹

27. In 2003, Controladora Comercial Mexicana, SA de CV (CCM); Gigante, SA de CV (Gigante); and Tiendas Soriana, SA de CV (Soriana) notified their intention to create Sinergia de Autoservicios, S de RL de CV (Sinergia), a firm that would make purchases for its stockholders which competed at the retail store level (supermarkets). The parties argued that Sinergia would create economies of scale in wholesale purchases, which would allow them to compete more effectively at the retail level. The Commission did not authorise this transaction, as it considered that Sinergia could become a vehicle for coordination among its stockholders.

28. The parties appealed this decision and offered conditions aimed at offsetting the potentially negative effects on competition that had led to the Commission's objection. After reviewing these conditions, the Commission decided that the mechanism to verify their fulfilment were not adequate and so resolved that the appeal was only partially founded. It revoked its initial resolution and issued a new one, authorising the creation of Soriana on the condition that the parties present appropriate commitments to eliminate potential threats to competition and provide a mechanism that would allow verification of their compliance with their proposed conditions.

Oxxo / Super's Rapiditos Bip Bip¹²

29. Cadena Comercial Oxxo, SA de CV (Oxxo) and Super's Rapiditos Bip Bip, SA de CV (Bip Bip) operate convenience stores. The first does so at a national level and the second at a local level, in Ciudad Juárez, Chihuahua. In 2004, Oxxo notified its intention to acquire Bip Bip's assets and its administrative filial, Administradora Regional del Norte, SA de CV. The merger would allow Oxxo to run Bip Bip's stores in Ciudad Juárez, and conferred it rights to Bip Bip's trademarks, inventories and a distribution centre. In addition, Oxxo would obtain long-term lease contracts for store spaces.

30. Convenience stores operate under a 24/7 schedule in a maximum area of 500 square metres; their retail product portfolio includes packaged goods, cigars, fast food, wines and liquors, as well as pharmacy products. Their clients are sensitive to distance, so that substitution amongst these stores is local. After accounting for these characteristics, the Commission determined that the relevant market was the operation of convenience stores in Ciudad Juárez.

31. In their contract, the parties had agreed to include a no-competition clause together with a license for the use of trademarks; both had a national dimension and were valid for 20 years. Oxxo considered that these conditions guaranteed that Bip Bip would not violate its lease agreements and would not try to

¹¹ Files CNT-97-2003 and RA-22-2004.

¹² Files CNT-48-2004 and RA-27-2004.

restore its stores. Nevertheless, the Commission deemed that the no-competition clause was excessive, since the trademark license already protected Oxxo from the illegal use of the rights or property of intangible assets and the clause barred the seller from installing convenience stores with different names in other parts of the country over the next 20 years. The FCC resolved to authorise the merger on the condition that the no-competition clause be limited to 5 years in Ciudad Juárez.

32. Oxxo subsequently appealed this decision, arguing that the complexity of the transaction required that the no-competition clause match the length the trademark license. The Commission considered that Oxxo had not justified either the scope of the geographic dimension or the time length of the clause. The FCC concluded that the appeal was without grounds and confirmed its decision.

Sky / Direct TV¹³

33. The case comprises two merger notifications. The first in 2004, when owners of Sky® and DirectTV® notified their intention to merge. Both companies owned the only two commercial brands operating DTH systems in Mexico, and the Commission objected to the merger. The second operation followed from DirecTV®'s bankruptcy.

34. In Mexico, Sky® is owned by Grupo Televisa, SA de CV (Grupo Televisa) and the Australian company News Corporation Limited (News). Grupo Televisa is the main open access television operator in the country, and owns stock in Empresas Cablevisión, SA de CV, which provides restricted cable audio and television services in the Mexico City metropolitan area under the brand name Cablevisión®. DirectTV® belongs to Grupo MVS, SA de CV (Grupo MVS) and Hughes Electronics Corporation (Hughes). Grupo MVS offers restricted microwave audio and television services (MDDS) under the brand name MasTV® in the metropolitan areas of Mexico City, Guadalajara, León, Mérida, Monterrey, Querétaro, San Luis Potosí, Toluca, Tuxtla Gutiérrez and Villahermosa.

35. The first operation derived from News' acquisition of an equity stake in Hughes and was notified in 2003 to the Commission and other international competition authorities. The FCC determined that the relevant market was the provision of restricted DTH audio and television services in national territory. However, since all parties involved had ownership ties in the related markets of cable and MDDS restricted audio and television services, programming sales, wide-broad band internet, and advertising spaces sales, the Commission analysed the effects of the merger on all markets.

36. The Commission determined that the merger would allow Grupo Televisa, News, Hughes and Grupo MVS to share common information, would eliminate an existing competitor, and create ties among Sky®, DirectTV®, Cablevisión® and MasTV®. Furthermore, the merger had the potential to encourage the parties to behave as one firm and might facilitate the abuse of a dominant position. This would damage service prices, quality and innovation in the relevant and related markets. In addition, the Commission considered that technological convergence in the provision of restricted audio and television services would be at risk since Cablevisión® and MasTV® services would rely, in the short and medium term, on programming provided by Grupo Televisa and News. Consequently, in January 2004, the Commission resolved not to authorise the merger, a decision that was subsequently appealed by the parties and ratified by Commission.

37. A few months later, Sky® notified its intention to acquire a data base of DirectTV® subscribers. The parties gave assurances that subscribers would not be forced to hire Sky® services, and that consumers

¹³ Files CNT-125-2003, RA-10-2004 and CNT-85-2004.

would be free to change their audio and television service supplier at all times. In its final decision, the FCC considered that the closing of DirecTV® operations in Mexico would substantially diminish competition, and that Sky® would become the sole service provider in the relevant market. The proposed operation would not only allow Sky® to identify possible subscribers once DirecTV® exited the market but give DirecTV® users the option of continuing with a similar service. In November 2004, the Commission authorised the merger with the condition that the parties commit, in writing, to publicise to DirecTV® subscribers that they had no obligation to hire Sky® services.

Pharmaceutical products

38. In 2004, the Commission analysed two mergers by multinational pharmaceutical companies involving products for human consumption. These mergers had horizontal effects in domestic markets and favoured product line diversification of the resulting company. In both cases, the merger review focused on future medicines and products for human consumption, where the Mexican subsidiaries involved concurred. A brief description of both transactions is included below.

39. The FCC generally adopts the third level categories of the *Anatomical Therapeutic Chemical* (AT3) to define the relevant product in the category of medicines. The geographic dimension of these markets is national, as regulations applicable to the industry differ by country. Future products do not have a specific standard classification, so product definitions and geographic dimension that apply to medicines are extrapolated to future products, based on the potential therapeutic uses of the active substances under development.

Sanofi / Aventis¹⁴

40. In June 2004, the Commission received notice of an international merger whereby Sanofi-Synthélabo, SA (Sanofi) would acquire stock from Aventis, SA (Aventis). In Mexico, their subsidiaries concurred in 23 medicine therapeutic classes of level three and 7 for future products.

41. Within the medicine classification, the Commission concluded that both anti-arrhythmic and digestive medicines by Sanofi and Aventis had different attributes and therefore belonged to different markets. For injected anticoagulants, vitamins A, D and their combinations, trichomonacides, specific anti-rheumatic agents and non-specific vaccines, concentration indices exceeded the Commission's pre-established parameters. Nevertheless, there were certain elements that diminished the risks that the parties would gain a dominant position in Mexico, such as the divestment of assets promised to the US and EU competition authorities, and the fact that important competitors existed in the market.

42. In the case of future products, Sanofi and Aventis concurred in 6 different classes: injected anticoagulants, anti-arrhythmic products, antispasmodics, oral anti-diabetics, other dermatological products, hypnotics and sedatives, and antidepressants. The products in the first two classes belonged to different markets. For the remaining classes, the resulting products that would enter the market would likely face significant competition from other renowned laboratories.

43. In October 2004, the Commission resolved to authorise the merger.

¹⁴ CNT-46-2004.

Bayer / Roche¹⁵

44. In September 2004, the FCC received notice of an international operation whereby Bayer Healthcare AG (Bayer) would acquire the Orion Business of Hoffmann-La Roche AG and affiliates (Roche). The Orion Business is a portfolio of over-the counter (OTC) products for human consumption.

45. In Mexico, Bayer's and Roche's subsidiaries concurred in the market for development, production and marketing of pharmaceutical products for human consumption, in the segments of medicine and future products. Two scenarios were analysed: the first grouped prescription (ethical) and OTC products, the second only considered OTC products.

46. In the medicine sector, the merger had horizontal effects in five therapeutic classes and Bayer and Roche's products concurred in: polivitamins and minerals, vitamin C (including combinations with minerals), and non narcotic antipyretic analgesics. In pharmaceutical specialties as well as in future products, the only class where the agents had a high level of market concentration was in vitamin C, including its combination with minerals. However, there is a wide variety of products that use vitamin C as its base and available sales information underestimates the total size of this market. In addition, potential competition exists since ascorbic acid, the main input for vitamin C, is a homogeneous product and barriers to entry are low. Finally, R&D for these products is aimed either at enhancing the medicines or at increasing their variety of presentations.

47. Based on these considerations, in October 2004, the FCC authorised the merger.

Interbrew / AmBev¹⁶

48. Interbrew, NV/SA (Interbrew) and Companhia de Bebidas das Américas-AmBev (AmBev) notified their intention to merge; this merger had the potential to create the largest beer company in the world. Interbrew would acquire stocks from AmBev, which in turn would acquire stock from Labatt Brewing Company Limited (Labatt), a subsidiary of Interbrew.

49. In Mexico, the merger had the potential to impact one of the two principal beer companies in the country, Femsá Cerveza, SA de CV (Femsá Cerveza), whose stockholders are Labatt and Emprex, SA de CV (Emprex), the latter company a subsidiary of Fomento Económico Mexicano, SA de CV (Femsá). Consequently, through Labatt, the transaction would give AmBev an indirect participation in the Mexican market.

50. During the investigation, the Commission found that Wisdom Import Sales Company (Wisdom), a subsidiary of Femsá Cerveza had brought a complaint in an American Court against the Interbrew/AmBev merger. Wisdom alleged that in the US, the parties agreed that Interbrew's distribution unit in North America would be in charge of the distribution of Femsá Cerveza's brands – this unit included Labatt USA, and Femsá was a minority stockholder.

51. The Commission postponed its resolution until the legal process in the United States concluded. In May 2004, Femsá, Interbrew and some of their subsidiaries withdrew their complaint and raised the possibility that Femsá would acquire, through Emprex, any outstanding stocks that Labatt held in Femsá Cerveza.

¹⁵ CNT-69-2004.

¹⁶ CNT-22-2004.

52. Having found that the operation would not affect the competition process in the domestic market, on June 2004 the Commission authorised the merger.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

3.1 *Regulatory framework*

53. In 2004, the FCC issued an opinion on a project to reduce entry barriers for cable and microwave networks. The project's object was to lease capacity to transport telephony signals.

54. It also negotiated two collaboration agreements with the Federal Commission for Regulatory Improvement (COFEMER) and PROFECO to integrate and coordinate competition, regulatory and consumer protection policies.

55. Regarding its enforcement activities arising from the powers granted to the competition authority by sectoral regulations, the FCC concluded 78 files related to procedures to allocate licences, permits or public contracts, either through public auctions or direct allocation procedures. All the opinions issued were favourable for the interested parties. In addition, the FCC received 521 notifications of economic agents interested in obtaining permits to undertake activities in the LP gas industry.

3.2 *Privatisations, licenses and permits granted by the Federal Government in regulated sectors*

3.2.1 *Megacable / GTM, transfer of a concession of radio electric spectrum for point to point links*¹⁷

56. In accordance with conditions in the concession title, Megacable Comunicaciones de México, SA de CV (MCM) and Grupo Telecomunicaciones Mexicanas, SA de CV (GTM) requested that the FCC issue a favourable opinion regarding the cession of rights from MCM to GTM, of a concession to provide capacity services for microwave point to point links in the 23 GHz band of the radio electric spectrum. GTM is part of Grupo Telefónica, headed by the Spanish firm Telefónica, SA. It holds two concessions for the provision of cellular telephony and PCS services throughout the country.¹⁸

57. The relevant service was defined as the provision of transmission capacity for wireless, point to point communication, in the 23 GHz frequency band of the radio electric spectrum. Wire links (copper and optic fibre) are not considered to be close substitutes because they imply more time and installation costs. The geographic dimension is national, according to the coverage authorised by the concession.

58. According to the Federal Telecommunications Commission (COFETEL), in 2004 there were 16 concession holders for capacity provision services in point to point links and 81% of them had concessions in the 23 GHz band with national coverage. Most concessionaires had presence in the national territory through one or several frequencies (15, 7 and 23 GHz), and Grupo Telefónica had only one concession to provide capacity in the 7 GHz band.

¹⁷ File OCCP-01-2003.

¹⁸ The national territory is divided into 9 regions: region 1 includes Baja California and Baja California Sur; region 2 includes Sinaloa and Sonora; region 3 includes Chihuahua and Durango; region 4 includes Nuevo León, Tamaulipas and Coahuila; region 5 includes Colima, Michoacán, Nayarit y Jalisco; region 6 includes Aguascalientes, San Luis Potosí, Zacatecas, Guanajuato and Querétaro; region 7 includes Puebla, Tlaxcala, Veracruz, Oaxaca and Guerrero; region 8 includes Chiapas, Tabasco, Quintana Roo, Yucatán and Campeche; and region 9 includes the Federal District, state of Mexico, Morelos and Hidalgo.

59. In January 2004, the Commission issued a favourable opinion citing that the transfer of concession rights in favour of GTM, would have no adverse effects on the competition process and free market entry in the relevant market. Furthermore, the transaction would allow GTM to access frequencies in the 23 GHz band and strengthen its position as a competitor in the markets for capacity provision and telecommunications services, especially in long distance.

3.2.2 *Opinions on the granting of concessions for the provision of cable TV services*

60. In 2004, in compliance with judicial sentences, the Communications and Transportation Ministry (SCT) requested that the Commission issue an opinion on competition arguments contained in incumbent concessionaires' objections to new concession applications to provide cable TV services in the cities of: Cozumel,¹⁹ Tijuana,²⁰ San Luis Potosí, and Soledad de Graciano Sánchez.²¹ Objections had arisen during administrative proceedings for which the SCT was solely responsible and, as a rule, did not require the FCC's opinion.

61. Incumbent concessionaires argued that existing networks had the capacity to fully satisfy demand in the areas where new concessions were being sought, and that they already faced strong competition from other restricted television operators (satellite and microwave) and from open access TV. They pointed out that the entrance of new cable TV operators would unnecessarily duplicate infrastructure and would lead to predatory competition, which would affect investments in the development of established networks. After analysing their objections, the Commission determined that there were no elements to conclude that applicants for new concessions would obtain substantial power in the relevant market or that they would incur in predatory pricing or other relative monopolistic practices. On the contrary, the presence of new competitors would introduce incentives to offer improved service, terms and prices that would favour the areas involved.

3.2.3 *Energy: electricity and natural gas*

Tamazunchale: auction for an electricity contract²²

62. In May 2003, the Commission received four requests for a favourable opinion for parties participating in the international public auction for a contract in the 21 CC Tamazunchale project. The economic agents were Iberdrola México, SA de CV; Energía Campoverde I, S de RL de CV; Petrobras International Braspetro BV; and a consortium comprised of Mitsui & Co LTD, Valladolid International Investments, S de RL de CV, and Hitachi LTD.

63. The relevant market was defined as capacity provision for generation and delivery of electrical energy in the national territory. Its geographic dimension is the national territory, which in 2005 will include the energy transmission network in Baja California's peninsula, and the states of Sinaloa and Sonora, which, until now have not been interconnected. The winning bidder will celebrate a long term buy-sell contract to sell its entire production to the Federal Electricity Commission (CFE), and would operate as an Independent Energy Producer (PIE).

¹⁹ OPN-01-2004.

²⁰ OPN-02-2004.

²¹ OPN-03-2004.

²² File LI-02-2003.

64. The FCC took into account the potential effects on contracts between the CFE and PIEs, of a restructure in the electricity sector. The Commission determined that none of the interested parties could acquire substantial market power since the CFE would maintain the highest share in electricity generation. In June of the same year, the FCC issued a favourable opinion to all four participants.

Transport of natural gas in the Yucatan Peninsula²³

65. In February 2004, Tejas Gas de la Península, S de RL de CV (TGP) notified the Commission of its intention to acquire a permit from the Energy Regulatory Commission (CRE) to build an open access transportation duct that would interconnect the Mayacan gas duct in Valladolid, Yucatán, with the Nizuc duct in the municipality of Benito Juárez, Quintana Roo.²⁴

66. The Commission determined that the relevant market was transportation services for natural gas, including receiving and delivering fuel between two points within the duct system, and that the geographic dimension of this market were areas within the Benito Juárez county, in Quintana Roo. The analysis took into account the fact that TGP would become the first provider of this service and that the new duct would add natural gas to the energy supply in Quintana Roo, allowing the region to develop projects with this input and to generate electrical energy. In May 2004, the Commission informed the CRE that it did not foresee any negative effects arising from this project.

4. Resources of competition authorities

4.1 Resources overall (current numbers and change over previous year):

a) Annual budget (in your currency and USD)

67. The annual budget exercised by the FCC in 2003 was 163 million Mexican pesos, equivalent to 15.1 million US dollars. It represented a 6.8 percent nominal increase with respect to its 2002 budget.

b) Number of employees (person-years)

68. At the end of 2004, the total number of employees at the FCC was 115. 74 of them worked in the enforcement divisions (31 lawyers, 28 economists, and 15 from other professions), and 41 provided administrative support. The average tenure for the Commission's personnel is five years and the productivity index was 7.6 cases concluded per person.

4.2 Human resources (person-years) applied to: enforcement against anticompetitive practices, merger review and enforcement, and advocacy efforts

69. In enforcing activities, the staff was distributed as follows: 17.4% worked on mergers; 60.9% were involved in investigations on anticompetitive practices; and 21.7% worked on enforcing sectoral dispositions.

70. Approximately one third of the FCC's staff undertakes advocacy activities along with enforcement activities; this includes the Plenum and the eight officials of the General Directorate of Privatisation and Auctions processes, as well as five officials from the General Directorate of International

²³ File AD-979-2003.

²⁴ The route of this private duct would cut through the states of Campeche, Tabasco, Chiapas and Yucatán to supply natural gas to several electrical centrals of the CFE.

Affairs, three members from the General Directorate of Regional Coordination, and two members of the Directorate of Economic Studies.

4.3 *Period covered by the above information: January through December 2004*

5. Summaries of or references to new reports and studies on competition policy issues

71. In 2004, the FCC published its 2003 Annual Economic Competition Report describing its activities and evaluating its performance during that year. The report is divided into four chapters, which summarise selected FCC decisions and illustrate their impact on the markets, providing elements that guided the final resolutions. The Report also includes a Statistical Appendix with detail information on the FCC's activities and a complete list of cases resolved during the year.

72. The FCC also edited and published a book entitled "Competition Policy in Mexico" on the occasion of its eleventh anniversary. The book compiles thirteen essays on topics and economic sectors that are vital to competition policy in Mexico, and were written by FCC officials as well as external authors –public officials, academics and independent consultants– all of them experts in the topics and sectors they addressed. The book is divided into five sections. The first includes four articles on general competition topics that have a generalised impact on all economic sectors: economic analysis of competition legislation, economic efficiency, regulation and competition, and leniency programmes. The remaining four sections discuss competition and regulation in the energy, financial services, health services, and communications and transportation sectors. Articles in each section analyse market performance for specific sectors under the current regulatory framework and make policy recommendations aimed at promoting a more efficient development in these sectors.

73. The OECD and the Inter-American Development Bank (IDB) published the report "Competition Law and Policy in Mexico". This report was the basis for the peer review in the OECD Competition Committee on February 10th 2004. It concludes that the FCC "... has matured into a credible and well-respected agency, compiling a remarkable record of achievements given the difficulties of its environments. The degree of general support for competition policy is, however, an open question, and certain deficiencies in statutory authority and judicial review processes constrain the FCC's efficiency. The Commission has also suffered a decline in resources despite an increasing workload. Further, certain features of the FCC's procedures and methods of interface with other government entities reduce its efficacy as a law enforcement agency and competition advocate...".

74. Additionally, during 2004, three issues of the Gazette (numbers 15, 16 and 17) were published including final resolutions issued from January through December 2003. Gazette 15 includes a paper on market power in network industries; Gazette 16 contains an OECD study on regulation, productivity and growth; and Gazette 17 includes an article on the institutional basis for competition policy.

Annex 1
FEDERAL COMPETITION COMMISSION
Files Processed 2003-2004¹

	2003	2004
MERGERS		
Cases filed and <i>ex officio</i> investigations initiated	197	189
Notifications	189	184
Ex officio investigations	3	1
Complaints	5	4
Concluded	196	191
No objection	186	178
Conditions imposed	2	4
Opposed	1	1
Others ^{2/}	7	8
In process	29	27
PRIVATISATIONS, CONCESSIONS AND PERMITS		
Cases filed	995	599
Concluded	1,122	565
No objection	37	27
Conditions imposed	0	0
Opposed	0	0
Others ^{2/}	1,085	538
In Process	44	78
MONOPOLISTIC PRACTICES AND OTHER RESCTRCTIONS TO COMPETITION		
Cases filed and <i>ex officio</i> investigations initiated	64	44
Ex officio investigations	10	3
Complaints	54	41
Concluded	38	42
Penalty or recommendation	6	8
Concluded in advance, based on Art.41 of the RLFCE	0	3
Others ^{2/}	32	31
In Process	58	59
CONSULTATIONS		
Filed	45	36
Concluded	44	32
In process	2	6
MARKET POWER AND COMPETITION CONDITIONS		
Filed	0	0
Concluded	0	2
In process	3	1
APPEALS FOR REVIEW		
Filed	52	34
Concluded	50	33
In process	5	6

Annex I
FEDERAL COMPETITION COMMISSION
Files Processed 2003-2004¹

	2003	2004
TOTAL		
Cases filed	1,353	901
Concluded	1,450	865
In process	141	177

1. Figures only include administrative proceedings concluded by the FCC.
2. It includes closed, withdrawn and dismissed proceedings.