

## Competition Law and Policy in Mexico

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### Introduction

Mexico's competition policy was introduced as part of a decade-long reform initiative, begun in the mid-1980s, to end central government control and protection of domestic economic activity and to develop instead a market-based economy. A key element in the government's economic reform was the adoption, in 1993, of the Federal Law of Economic Competition (LFCE), and creation of the Federal Competition Commission (CFC) to enforce it.

In 1998, as part of a larger study, the OECD assessed the status of Mexico's competition policy. The 1998 Report concluded that the LFCE reflected a well-conceived synthesis of contemporary economic principles, and that the CFC possessed both strong enforcement powers and authority to determine whether the absence of effective competition in a market sector warranted regulatory intervention by the government. The report noted, however, that there was no clear base of support for competition policy, and that the vigour of the Competition Commission's enforcement record to that point could be questioned.

In 2004, the OECD updated the 1998 study (available at [www.oecd.org/competition](http://www.oecd.org/competition), see country review section). The current report concludes that the strengths identified in 1998 still pertain, and that doubts about the CFC's willingness to engage powerful economic interests have largely dissipated. Further, the Commission has matured into a credible and well-respected agency that has compiled a remarkable record of achievement given the difficulties of its environment. The agency still confronts an array of challenges and opportunities for improvement. The degree of general support for competition policy remains an open question, and certain deficiencies in statutory authority and judicial review processes constrain the CFC's ability to address anti-competitive conditions effectively and efficiently. The Commission has also suffered a decline in resources despite an increasing workload, and some features of the CFC's procedures and methods of interface with other government entities reduce its efficacy as a law enforcement agency and competition advocate. The 2004 Report recommends changes that the Commission can make to enhance its performance, and also suggests certain alterations in government authority and procedure that the Commission is urged to seek from other branches of government. ■

## What is the institutional structure for competition law enforcement and advocacy in Mexico?

The Competition Commission, which has sole responsibility for applying the LFCE, is an independent agency attached to the Economics Ministry for purposes of budgetary administration. The Commission's Chairman and four commissioners (constituting the agency's Plenum) are appointed for staggered ten year terms by the President of Mexico, and are removable only for cause. The Plenum makes determinations by majority vote. CFC cases may be initiated either on complaint by an affected party or "ex officio" by the Commission itself.

The competition policy objectives set out explicitly in the LFCE 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." Commercial practices are classified as either absolute or relative. "Absolute" monopolistic practices are prohibited *per se* and agreements to undertake them are legally void. Such practices cannot be defended by claiming that they are efficient, as their inefficiency is presumed conclusively by the law. In contrast, "relative" monopolistic practices may not be found illegal unless the respondent is found to have "substantial power" in a defined relevant market and fails to prove an efficiency defence.

The absolute monopolistic practices that are subject to *per se* prohibition include four categories of hard-core "horizontal" agreements (that is, agreements among competitors). These are price fixing, output restriction, market division, and bid rigging. Additional horizontal practices may be treated as unlawful relative practices under a statutory catch-all provision covering any actions "that unduly damage or impair the process of competition and free access to production, processing, distribution and marketing of goods and services".

All varieties of vertical agreements (that is agreements among firms at different levels in a distribution chain) are treated as relative monopolistic practices, specifically including vertical market division, resale price maintenance, tied sales, exclusive dealing, and refusals to deal. A further category specified as a relative practice is the collusive boycott, a species of horizontal behaviour that frequently has a vertical component. Additional types of vertical agreements may be reached under the catch-all provision. The catch-all provision has an implementing regulation that adds five

items to the list of relative practices: predatory pricing, exclusive dealing in exchange for special discounts, cross-subsidisation, discrimination in price or conditions of sale, and raising rivals' costs.

The LFCE does not deal expressly either with monopoly as such or with abuse of dominance. Single-firm practices that may be defined as abuse of dominance or monopolisation in other countries are treated as relative monopolistic practices under Mexico's law. With respect to mergers, the law expressly prohibits acquisitions whose objective or effect is to reduce, distort or hinder competition. In assessing mergers, the CFC is required to identify the relevant market, determine the existence of market power, and consider whether the merging parties would be enabled to fix prices unilaterally, substantially restrict competitors' access to the market, or engage in unlawful monopolistic conduct. The law also requires advance notification to the CFC for mergers exceeding certain size limitations.

The Commission is responsible for determining which economic agents may participate in any privatisation proceeding to divest government owned companies. Also, in sectors such as railroads, telecommunications, satellite services, and natural gas distribution, a favourable Commission opinion is a necessary condition for prospective participants interested in obtaining concessions or licenses issued by sector regulators through a public auction or directly through an administrative proceeding. In assessing auction applicants, the CFC considers the implications of supply conditions and the applicants' market power. Further, most of Mexico's sector regulatory schemes authorise the regulating agency to impose price regulation, access controls, and other requirements on sector participants only if the CFC finds an absence of effective competition in the relevant market (or, in telecommunications, the existence an economic agent possessing substantial market power). The Commission may also make a subsequent determination that, due to market changes, effective competition has been restored, so that regulatory controls must be terminated.

The LFCE vests the CFC with authority to engage in certain forms of competition advocacy. The Commission is empowered to address the competitive effects of proposed changes to federal programs and policies and, at the request of the Federal Executive, to comment on the competitive implications of new laws proposed by the executive branch to Congress. The Commission also has discretionary authority under the LFCE to issue, on its own initiative, non-binding

opinions addressing questions of competition policy with respect to laws, regulations, agreements, and other governmental acts. Commission regulations provide for the issuance of similar non-binding opinions in response to a request from any private party or governmental agency.

The CFC also participates in a number of inter-ministerial commissions to advocate competitive principles in the design and implementation of governmental policies and programs. Among these commissions are the Foreign Trade Commission (COCEX), which reviews proposals by the Economics Ministry to establish tariffs and impose trade law sanctions such as countervailing duties and anti-dumping penalties, and the Federal Regulatory Reform Commission (COFEMER), which plays a critical role in reviewing all regulations proposed by federal government agencies.

The CFC's decisions and proceedings are subject to judicial review by dissatisfied parties. Two forms of proceeding are potentially available: an "*amparo*" action in a federal district court and an appellate action in the Court of Fiscal and Administrative Justice ("Fiscal" or "Tax" Court). The *amparo* is a proceeding established in the Mexican Constitution and available to any party claiming that he is being subjected to an unconstitutional statute or agency action that is arbitrary, unsupported by substantial evidence, or founded on reasoning that is illogical or contrary to general principles of law. A proceeding in the Tax Court is available to review any agency action that involves the imposition of a monetary payment obligation on a private party.

CFC orders that impose fines are not self-executing, even if they survive all *amparo* and Fiscal Court review proceedings. Once a fine has become final and payable, it must still be collected, a duty that falls to the fiscal department of the municipality in which the fined party resides. If payment is not made voluntarily, the municipal treasurer must commence an administrative proceeding to issue an order of execution against the debtor's assets, and this proceeding is itself subject to *amparo* review. ■

### What are the principal strengths and weaknesses of the Commission?

The analytic quality of the LFCE and its implementing Regulations is a significant strength, as is the consolidation in the CFC of authority to make the market power determinations that trigger government

intervention in market operations. The Commission's authority to make such determinations applies not only to its own merger and monopolistic conduct law cases, but to sectoral licensing and natural monopoly regulation as well. In the past five years, the Commission has matured into a credible organization, viewed with respect both domestically and internationally. It pursues its mission according to best principles of management and the highest standards of public service, and has mobilized its limited resources effectively to focus on the matters most relevant to promoting competition policy in Mexico. It has investigated and pursued a large number of law enforcement cases, maintained a focus on regulated and privatized sectors, sought to broaden its base of support by publicizing its actions to a wider audience and conducting outreach activities, and established important international antitrust co-op agreements.

On the other side of the ledger, the degree of general support for competition policy is still an open question and remains a potential vulnerability. There are indications that the CFC will enjoy an increase in support from the executive branch, but this should not deflect the Commission from continued efforts to expand its base of popular support. Additional weaknesses arise from certain statutes and judicial processes (including especially the *amparo* process and monetary fine collection) that constrain the CFC's ability to remedy anti-competitive conduct and market conditions. The Commission also suffers from a decline in its budget and staffing levels. Finally, there are some deficiencies in the Commission's own case litigation procedures, and in its interface with other government entities, that reduce the CFC's efficacy as a law enforcement agency and competition advocate. ■

### How can the Commission alter its procedures and policies to increase its efficacy?

- Provide respondents in Commission proceedings with better incentives to settle cases by consent and thus reduce the volume of *amparo* (judicial review) suits filed against the Commission

During the past five years, the Commission obtained settlements in about 17 per cent of the 54 complaint cases that involved either a Commission finding that the LFCE had been violated or in a settlement by consent. The comparable figure for the CFC's 32 *ex officio* cases was about 22 per cent. While these percentages are not trivial, the CFC should seek to

settle at significantly higher rates. Antitrust enforcement agencies will ordinarily generate more economic benefits if a substantial proportion of cases are settled by consent. Litigation and judicial review is not only expensive and exhausting, but it also generally results in continuation of the anticompetitive practice while the litigation proceeds. An important benefit of settlement is prompt termination of the offensive practice.

One problem to be addressed in this respect is the perception held by some practitioners that CFC agency decisions are insufficiently transparent and biased against companies targeted by Commission investigations. A party that perceives itself to be unfairly treated is likely to seek judicial review and to resist settling its case with the Commission. Further, some of the Commission's own case procedures also constrain the settlement rate. For example, a company subject to Commission investigation might be willing to adjust its practices voluntarily to satisfy the Commission's concerns but, under current practice, the investigative target does not learn the Commission's specific concerns until the preliminary investigation is completed and the Commission commences formal proceedings. The Commission should open a dialog with the Mexican Bar Association to examine agency practices and procedures that inhibit case settlements. The Bar Association is supportive of competition policy and is interested in cooperating with the Commission to develop an effective and efficient system for the fair investigation and adjudication of CFC cases.

- Establish a program to monitor closely regulatory proposals posted for review by COFEMER and submit appropriate comments on proposals that threaten anti-competitive effects

The Regulatory Reform Commission (COFEMER) is the body to which all federal agencies in Mexico must submit their proposed regulations, accompanied by a regulatory impact statement. The Commission has rarely participated in COFEMER proceedings, and should immediately establish a program to monitor COFEMER's regulatory postings, identify proposals that warrant comment, and submit appropriate statements on the record by the applicable deadline. COFEMER'S public review proceedings provide an excellent opportunity for the Commission to enhance both its visibility and its impact on the day-to-day operations of Mexico's regulatory processes.

- Maintain a much closer relationship with PROFECO, both to obtain assistance in detecting and prosecut-

ing collusive behaviour and, more importantly, to employ the tools offered by PROFECO for communicating the benefits of competition more effectively to the public

The Federal Prosecutor for Consumers (PROFECO), located in the Ministry of Economy, is responsible for enforcing Mexico's consumer protection law. PROFECO maintains a wealth of product pricing data that could be useful to the CFC in detecting collusive behaviour. Further, PROFECO has an unmatched capacity to communicate with the consuming public, and is willing to employ that capacity to aid the CFC. The CFC could use the tools offered by PROFECO to educate the public more effectively about the benefits of competition.

- Assess fines aggressively in cartel cases, refer corporate officers for criminal prosecution, and employ other tools to promote the exposure of collusion

In hard-core collusion cases involving large companies, the Commission should not only consider imposing fines up to the maximum permitted under the LFCE, but also consider invoking the statutory provisions permitting assessment of an alternate fine equal to the greater of 10 per cent of the violator's annual sales or 10 per cent of the violator's assets. The CFC should aggressively employ its statutory authority to refer corporate officers to the Public Prosecutor for criminal prosecution and engage the Prosecutor in a project to develop criteria for the filing of criminal complaints in Commission cases. Additional tools to promote the exposure of collusion should also be examined, such as 1) obtaining authority to offer monetary rewards to lower-level corporate employees who reveal conspiratorial agreements to the CFC; 2) sending investigators into the field to interview customers in suspect markets; 3) scrutinizing auctions involving public construction, commodity supply to government installations, and other matters particularly vulnerable to bid-rigging; 4) tel investigations; and 5) examining domestic industries protected from import competition by anti-dumping duties.

The Commission should also:

- Undertake more interaction with national business organizations and business chamber consortia to explain and advocate competition policy.
- Provide a fuller explanation of its fine imposition decisions to avoid reversal in Fiscal Court review proceedings.

- Employ any increase in resources to hire additional professional staff, with particular emphasis on securing expert lawyers.
- Adopt criteria for assessing the significance of failing firm conditions in merger cases.
- Issue appropriate confidentiality regulations to avoid inappropriate disclosure of sensitive commercial information by judges in *amparo* suits against the CFC.
- Amend the pre-merger notification regulations to clarify the circumstances in which filing is not required for restructuring transactions undertaken by foreign firms with Mexican subsidiaries.
- Encourage the identification of economists with appropriate professional expertise for retention by *amparo* courts as experts in CFC cases. ■

### How can Mexico change the laws affecting the Commission to enhance its efficacy?

- Require Senate approval of Commissioner appointments to the CFC and establish the CFC's budgetary independence from the Executive Branch.

Legislation has already been proposed that would require Senate approval of Presidential appointments to the CFC. The Commission is, at present, an independent agency free from direct control by either the executive or legislative branches. The agency is not, however, nor should it be, completely insulated from the political dynamic of Mexico. Its independence is mediated through a variety of interactions with those two branches of government, including the budgetary process and congressional hearings. An important point of political modulation occurs when a vacant commission seat is filled for a ten year term. Providing the legislative branch with a role in the appointment process will bolster the Commission's legitimacy as an agency entitled to exercise significant federal power. The pending legislation would also authorize the CFC to present its budget directly to the Finance Ministry rather than through the Economics Ministry. This legislation should be expanded to provide the CFC with full budgetary independence, enabling the Commission to present its budget directly to Congress rather than through a ministry. If the executive branch considered the CFC's request to be excessive, it would be obliged to make that argument to Congress rather than cutting the Commission's

request unilaterally. This change, in conjunction with the provision requiring Senate approval of Commission appointments, will balance legislative and executive branch authority more evenly with respect to the CFC and enhance the agency's stature.

- Increase the Commission's budget allocation.

The Commission employed 8 per cent fewer people in 2002 than it did in 2000, despite a 25 per cent increase in workload (measured by output) during the same period. The Commission's ability to address all of its responsibilities in an effective manner is compromised by resource constraints, and its budget should be increased appropriately.

- Empower the CFC to block anticompetitive decisions in trade law proceedings.

The antidumping and countervailing duty mechanisms adopted by Mexico under the GATT are administered by the Unfair Trade Practices Unit (UPCI) in the Economics Ministry. By law, UPCI must submit its proposed resolutions for review by the inter-ministerial Foreign Trade Commission (COCEX), of which the CFC is a statutory member. The authority of COCEX is limited to commenting on UPCI's proposals, although the final resolution issued by the latter agency is supposed to recite and respond to any COCEX comments. Enforcement of fair trade laws against imports can distort competition in domestic markets. Antidumping duties imposed by the UPCI have sometimes protected national producers with a dominant position in the domestic market. In other cases, the duties simply delay an effective market clearing process by protecting inefficient local firms. As a single voice among the members of COCEX, the CFC cannot control outcomes and has not had much success in influencing UPCI's decisions. The Commission should be empowered to block anti-competitive decisions in the application of the trade laws.

- Vest the CFC with expanded investigative powers and authority to establish a leniency program for conspirators who voluntarily reveal collusive agreements.

The Commission should be authorized to conduct unannounced searches for business records at corporate offices in order to detect surreptitious collusion. The LFCE should also be amended so that conspirators who voluntarily reveal collusive agreements to the Commission could receive immunity from (or significant reductions in) monetary penalties.

- Empower the CFC to remedy structural monopoly problems directly, and vest the Commission with authority to study suspect industries.

The CFC should have authority to attack structural monopolies in cases where no unlawful monopolistic practices under the present provisions of the LFCE could be established. The CFC would thus be able to prosecute a dominant firm that exhibited the persistent ability to injure consumers by restricting supply and raising prices. The most prominent difficulty involved in prosecuting structural monopolies is the development of an adequate remedy. Typically, either divestiture or some form of price control is imposed. Both are problematic measures to implement in an efficient manner, and both ordinarily injure the affected company's shareholders by diminishing asset value. The CFC should therefore keep such remedial power in reserve for occasional use in exceptional, but important, cases. The LFCE should also be amended to rectify the fact that the CFC cannot presently employ its investigative powers merely to ascertain whether a market is hobbled by structural monopoly power. The Commission can investigate only to determine the existence of practices that are unlawful under the LFCE. The CFC should have statutory authority to conduct investigations for the purpose of examining the practical and economic features of an industry's operation.

- Assure that the CFC has an adequate opportunity to participate in all proceedings conducted by federal regulatory agencies, and require that regulatory agencies reply on the public record to the Commission's comments.

To assure adequate treatment of competition policy issues, the CFC should have a formal right to participate in all regulatory agency proceedings, either through a generally available public comment period or through a procedural regulation tailored specifically for the CFC. Further, the regulatory agency responsible for resolving the proceeding should be obliged for reasons of transparency to reply on the public record to the CFC's comments.

- Establish a specialized *amparo* court with economic expertise to hear cases from the CFC and other agencies that deal with economic issues, and prevent *amparo* courts from granting inappropriate stays of CFC orders during judicial review.

The *amparo* process significantly delays resolution of Commission proceedings. Further, when Commission orders are at issue, respondents routinely request, and the district courts ordinarily grant, motions to stay

the CFC's order during the court's review. While the Commission has been almost completely successful in *amparos* that have reached the Supreme Court, district courts have ruled against the CFC on numerous occasions, typically on points of procedure. There is perhaps a particular bias toward such adverse decisions whenever an *amparo* case involves both procedural issues and a challenge to the merits of a final CFC decision. The district courts are unfamiliar with, and perhaps uncomfortable about, substantive antitrust issues. Further, Mexico employs a civil law system that has traditionally involved detailed legislative enactments, and courts are unused to dealing with a statute as short and non-specific as the LFCE. By ruling adversely on a procedural point, the court can send the case back to the CFC and thus avoid resolving the antitrust question.

The establishment of a specialized *amparo* court with economic expertise to hear cases from the CFC (and other agencies that deal with economic issues) will resolve the problems associated with judicial review by judges unfamiliar with economic analysis. The existence of such a court may also lead to outcomes more congruent with Supreme Court and appellate tribunal precedents when procedural issues are at stake. Consolidation of all CFC cases in a single court will, at least, avoid the complexities posed when multiple *amparo* cases are filed in different federal courts. Whether or not a specialized court is created, action should be taken (by amending the *amparo* law or otherwise) to prevent *amparo* courts from granting inappropriate stays of CFC orders during judicial review.

- Streamline and improve the procedures that affect the collection of fines imposed by the CFC.

Due to the judicial and procedural intricacies involved in collecting fines, only a small portion of the fines ordered by the Commission has been collected. Through 2002, the Commission imposed 493 fines amounting to 329 million pesos (about \$31.2 million USD). Of that amount, it has collected 9.5 per cent (slightly less than \$3 million USD) and revoked or lost on judicial review another 18.5 per cent, leaving uncollected the remaining 72 per cent (\$22.5 million USD). To improve collection rates, the procedural rules for Fiscal Court cases should be modified so that, in CFC matters, parties seeking review of Commission fine orders will have to post a bond assuring payment if the Commission's decision is sustained. This would avoid any subsequent fine collection issues in such cases. In *amparo* cases that involve review of CFC decisions imposing a fine, the applicable rules

already permit the Commission to request that the appellant post a bond assuring payment if the Commission's decision is sustained. Requiring a bond is, however, within the court's discretion, and this procedure should likewise be revised so that such a bond is required in every CFC fine assessment case. The rules controlling the review of Fiscal Court decisions by appellate tribunals should be amended to eliminate the existing jurisdictional amount requirement in CFC cases, so that the Commission may obtain appellate review of adverse Fiscal Court deci-

sions. Finally, the procedures that apply to the collection of fines once judicial review is completed should be streamlined and simplified. ■

### **For further information**

For further information about the OECD's work on competition policy, please see our website at [www.oecd.org/competition](http://www.oecd.org/competition) or contact us at [daf-comp.contact@oecd.org](mailto:daf-comp.contact@oecd.org)

## For further reading

- **OECD Journal of Competition Law and Policy**  
ISSN: 1560-7771, Subscription (4 issues per year) € 189.
- **Access Pricing in Telecommunications, 2004**  
ISBN: 92-64-10592-1, € 40, 224 p.
- **Trade and Competition: From Doha to Cancun,**  
2003, € 23, 75 p.
- **OECD Economic Surveys: Mexico – Volume 2003 Supplement 1,** ISBN: 92-64-01981-2, € 35, 248 p. The following publications are available on our website at [www.oecd.org/competition](http://www.oecd.org/competition) ("Country Reviews" section)
- **Competition Law and Policy in Mexico: An OECD Peer Review**
- **Políticas y Ley de competencia económica en México: Examen inter pares**
- **Competition Law and Policy in Chile: A Peer Review**
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