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**THE OBJECTIVES OF COMPETITION LAW AND POLICY
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- MEXICO --

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MEXICO

THE OBJECTIVES OF COMPETITION LAW AND POLICY AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY WITHIN THE OVERALL GOVERNMENT

1. Purpose

The purpose of this contribution is threefold. First, it is to briefly describe the official objectives of Mexican competition policy and the way in which the Federal Competition Commission (FCC) perceives them in both policy design and law enforcement. Second, it is to discuss the institutional setup of competition law and policy in Mexico, the role of the FCC, its powers and limitations, the reasons why the institutional design is as it is and some of its pros and cons. A final purpose is to explore the relation, if any, between the objectives of competition policy, on one hand, and the institutional design of the competition agency, on the other.

The following sections are organized according to these three purposes. That is: (i) objectives of competition policy, (ii) institutional design of the competition agency and (iii) the relation between objectives and institutional design.

2. Objectives of Competition Policy

According to Article 2 of the Federal Law of Economic Competition (FLEC) the objective of the law is to “protect the process of competition and free market access by the prevention and elimination of monopolies, monopolistic practices and other restrictions to the efficient functioning of markets”. Likewise the preamble to the FLEC establishes as objectives of competition policy the promotion of economic efficiency and the avoidance of monopolistic practices in order to protect competition and free market access.

The importance of economic efficiency as the primordial objective of competition policy is further strengthened by explicit efficiency defenses established in Article 6 of the Code of Regulations of the FLEC (RFLEC) for relative monopolistic practices and in Article 15 for mergers. That is, otherwise anti-competitive practices or mergers may occasionally be allowed due to the efficiency gains they bring about. This implies at the same time the implicit recognition that competition and free market access are intermediate goals which may at times be overruled when they are at odds with the ultimate goal of economic efficiency.

Mexican competition policy has no other objectives, such as might be employment creation or preservation, redistribution of income, industrial development, promotion of small and medium enterprises, etc. Although it is strongly believed that competition policy contributes, albeit not on purpose, to each of these goals in the long run, in the short run there may be frictions and in such cases Mexican competition policy is guided by the goal of economic efficiency rather than by any of the other ones. Likewise, Mexican competition policy does not promote “national champions” nor does it favor national over foreign interests. In fact, the nationality of firms involved in investigations conducted by the FCC is irrelevant for their outcome.

For the purpose of law enforcement economic efficiency is understood as maximization of social welfare, i.e. consumer surplus plus producer surplus. Thus, although consumer welfare is not explicitly mentioned as an objective of competition policy, it is implicitly present in the goal of economic efficiency. However, in this interpretation producer surplus is equally important as consumer surplus so that pursuing economic efficiency does not take into account aspects of redistribution of rents between producers and consumers. Still, it is believed that competition policy, by combating market power and by thus narrowing down the gap between prices and marginal costs, usually brings about a redistribution of rents in favor of consumers.

As is well-known, economic efficiency in the short-run may be in conflict with economic efficiency in the long run, particularly, but not only, in high-innovation markets. In such cases it is rather long-run economic efficiency that counts. The prevalence of long-run over short-run considerations is also reflected by the exemptions from the monopoly provision of intellectual property rights (IPR) in Article 5 of the FLEC. That is, there is a temporal allowance of a certain monopolistic exploitation of IPRs for the sake of long-run innovation. From a more general perspective the long-term nature of the efficiency goal implies a tolerant attitude of the competition agency towards a Schumpeterian process of *creative destruction* which keeps markets clean and makes industries competitive in the long run. This is perhaps one of the most controversial aspects of Mexico's competition policy.

3. Institutional Design of the Federal Competition Commission

The Federal Competition Commission was created in 1993 as a decentralized administrative entity of the then Ministry of Commerce and Industrial Promotion (now Ministry of Economy) following the provisions of Article 23 of the FLEC. The FCC has operational and technical autonomy to investigate and adjudicate competition cases and to sanction or impose other behavioral or structural remedies on anticompetitive conduct or mergers. Apart from that, the FCC is empowered to issue opinions, both on its own initiative and upon request, on public policies and the way they are implemented.

In practice the legal autonomy of the FCC is respected to a great extent. This is in part thanks to the fact that the President of the Commission and the other Commissioners (four) are named for a period of 10 years and cannot be removed, unless for extreme reasons not related to the decisions they take. Moreover, the mechanism of budget assignation guarantees a reasonable degree of autonomy. That is, it is difficult to retaliate with budget restrictions any resolutions by the FCC that run counter specific political interests, and in practice this has never happened. We consider such minimum guarantees essential for a proper implementation of competition policy.

It is important to notice that both investigative and adjudicative powers are concentrated in one single agency in charge of competition law enforcement and that there is no direct private right of action. That is, private parties harmed by anticompetitive conduct that violates the FLEC cannot file their case directly with a Court of the Judicial System, but must bring their complaint before the FCC and only after the FCC resolves in their favor they may claim damage before a Court. In fact, the adjudicative power in competition cases rests exclusively with the FCC and the role of the Judicial System is confined to that of an appeal body.

This institutional design of competition policy has far-reaching consequences for its implementation and can only be properly understood in the context of the level of institutional development of Mexico, which, for the time being, does not allow for a greater participation of the Judicial System in the adjudication of competition cases. A first consequence is that there is a great concentration of power in the competition authority which both investigates and adjudicates. The disadvantage of such a combination of powers are various and well-known. First, there may be conflicts of interests between

investigation and adjudication. Second, procedural transparency may suffer and, third, the accountability of an autonomous body with such ample powers may easily get lost. It should be admitted that there is still the possibility of appeal before the Judicial System, but such appeal is mostly limited to aspects of due process without entering into a substantive evaluation of the economic efficiency effects of the cases at stake.

A second important consequence is that the FCC has the obligation to investigate any complaint about anticompetitive conduct that meets some minimal requirements of form. It cannot confine itself to the more important cases that have a major impact on competition and consumer welfare, delegating cases of minor importance to private litigation before Courts, as competition authorities can do in jurisdictions with an ample private right of action. The obligation to investigate every complaint irrespective of its relative (un)importance can easily lead to a suboptimal allocation of scarce investigation resources.

The combination of investigative and adjudicative powers in a single agency has also important advantages, however. These advantages are basically two. In the first place, a close coordination between investigation and adjudication is highly desirable for reasons of coordination and is easier to achieve when both functions are combined in one agency. In the second, heavy reliance upon the Judicial System for purposes of adjudication of competition cases in a country where most judges are unfamiliar with competition principles doesn't seem realistic. This is particularly so due to the complexity of competition cases and the fact that their understanding requires specialized training. In principle, such concerns could also be solved by installing a specialized competition tribunal that belongs to the Judicial System, as is done in some other jurisdictions. However, given the state of development of the Judicial System and other institutions in Mexico and in view of the potential synergies between investigative and adjudicative activities, the present institutional set-up of competition policy was considered the most appropriate solution at the time the competition system was put into place. Today, almost ten years later, it is believed that the system has worked reasonably well and that in Mexican circumstances it will continue to be the best institutional setup for some time to come, at least until the Judicial System has developed the necessary experience and skills required for a proper adjudication of competition cases.

4. Objectives and Optimal Design

The special focus on economic efficiency as the primordial objective of Mexican competition policies does not imply that other objectives of economic policy such as employment preservation, equity and income redistribution, etc. are considered unimportant or subordinated to the goal of economic efficiency. There are other institutions pursuing those goals. The fact that the competition agency exclusively pursues economic efficiency rather implies that eventual conflicts between different objectives are not resolved within the competition authority but between different institutions in accordance with their respective responsibilities and powers.

To give an example, let us consider a jurisdiction in which the financial sector is not exempted from competition law and where a merger between banks needs the approval of the competition authority. Such a merger can be blocked by the competition authority, even when the financial regulator would be in favor of the merger, e.g. with an eye on the improvement of capitalization ratios that the merger would bring about. In such a case, the conflict between the two goals - economic efficiency/competition versus capitalization ratios - is resolved not so much by the institutional design of the competition authority within the Government but by the institutional design of what exactly are its competences and responsibilities in relation to those of other authorities, i.e. by the structure of economic governance in the country.

To give another example, the Mexican FCC is represented in the Foreign Trade Commission, a legally established body of compulsory consultation before specific trade-restrictive measures, such as

antidumping quota or tariff changes, are implemented. The Foreign Trade Commission cannot block such measures but it can express its disagreement, which would be publicly available. In that way it enhances the accountability of foreign-trade policy. However, the FCC has no shared power to veto antidumping measures. It is the trade authority that decides.

This is important from a point of view of policy objectives. Should the FCC have the explicit power to block measures restricting foreign trade, perhaps competition policy objectives would have to be broadened so as to include also employment preservation, avoidance of social disruption, etc.

Thus, it is not only the institutional design of the competition authority within the Overall Government - i.e. whether it is within a Ministry or an autonomous institution, its degree of independence, private right of action, etc. - which bears a relation with competition policy objectives, but also, and perhaps even more so, the detailed interinstitutional design of competences and responsibilities - coverage of law, sectoral or other exemptions, kind of powers granted in competition advocacy, etc. - that matters.

From a Mexican perspective there does not seem to exist a clear relation between the focus on economic efficiency as a policy goal, on one hand, and the institutional design of the competition authority, on the other. Should there be a sudden change of objectives towards more emphasis on consumer welfare or employment creation or any other, it is unlikely that the institutional setup of the FCC would have to be adjusted. There might perhaps be some reshuffling of powers and responsibilities with other authorities but its status as an autonomous decision maker independent of other Government body's would not be affected. In stead, it is believed that the optimal design of the competition authority within Government responds much more to factors of institutional development (Judicial System, rule of law, economic governance, etc.) than to the objectives it pursues.