DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON CARTEL JURISDICTION ISSUES, INCLUDING THE EFFECTS DOCTRINE

-- Mexico --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item V of the agenda at its forthcoming meeting on 21 October 2008.

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1. **Introduction**

1. This document analyzes the main jurisdictional issues as well as International law considerations that are confronted by the Federal Competition Commission (hereinafter CFC or Commission) in Cartel cases, including the effects doctrine.

2. The central thesis of this note is that in Mexico, it is considered that any organization or individual that participates in an economic activity in the Mexican territory, or an economic activity abroad but which has an effect in Mexico, is subject to the competition laws of the Country.

3. The first section outlines the regulatory framework; the second section reviews the main enforcement issues; the third section analyses the implications in private damages claims; the fourth section analyses a variety of Cartel cases in which the CFC has intervened and where important considerations of jurisdiction or related issues have been made; and the fifth section offers some final considerations.

2. **Regulatory Framework**

4. Since the Federal Law of Economic Competition (hereinafter FLEC) came into effect in 1993, the CFC became the only government agency which can enforce the FLEC and its Regulations in Mexico. While there were some debates about the Federal nature of competition regulation and a possible conflict of powers between the Federation and the states, some judicial decisions have resolved the issue in favor of a federal administrative regime of competition law.

5. Enforcement proceedings in Mexico are of an administrative nature. In this regard, a division of the CFC is in charge of the investigation proceedings which are then considered by the Plenum of the Commission, and if the evidence is sufficient, an Order of Alleged Responsibility is presented against the implicated agents. An administrative proceeding is then initiated before the CFC that follows the form of a judicial proceeding and adheres to the formalities of due process, where the defendants may present evidence and allegations against the accusations. Based on the merits of the case, the Plenum of the CFC then issues a decision and may impose sanctions. This decision may only be reviewed by the Plenum of the CFC. The decision on the administrative review is final and it may only be subject to judicial consideration in Constitutional Relief proceedings where violations of the constitutional rights of the parties are alleged.

6. Cartels may also be considered a crime in Mexico, but only under very specific and restricted considerations that make it very difficult to prosecute as a criminal offence. The CFC may file a petition

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1. Published in the *Diario Oficial de la Federación* on December 24, 1992.
3. The Plenary of the CFC is composed of 5 commissioners.
4. Articles 30 to 34 bis 3 of the FLEC and articles 28 to 44 of the Regulations of the FLEC regulate investigation proceedings.
5. Articles 30 to 34 bis 3 of the FLEC and articles 45 to 52 of the Regulations of the FLEC regulate this proceeding.
6. Article 39 of the FLEC regulates this proceeding.
7. Resolution to Contradiction of Criteria 248/2007-SS.
for action before the “Public Ministry” (Ministerio Público), the government body empowered to prosecute criminal offences and a division of the Attorney General's Office. The Ministerio Público makes all criminal prosecutions at the federal level. In fact, the Attorney General’s Office has never started prosecution of a Cartel case in Mexico. Changes to the Federal Criminal Code on this matter are already being discussed in Congress.

7. On private litigation, pursuant to the provisions of the FLEC\(^8\), actions for recovery of damages may only be attempted after a final decision by the CFC on the illegality of a conduct has been issued and can no longer be subject to litigation.

3. **Enforcement Action**

8. All Cartel cases have to be substantiated and sanctioned by the CFC according to the proceedings described above. The investigation proceeding may be initiated *ex officio* or in response to a formal complaint. There are no restrictions on who may file a complaint in Cartel cases.

9. The purpose of the FLEC is to protect the competition process, and the free market access, by preventing monopolies, monopolistic practices and other restrictions that deter the efficient operation of the goods and services market.

10. Regarding jurisdictional issues, the limits are set out in the FLEC:

   *Article 1.- This law rules Article 28 of the Constitution on economic competition, monopolies and free market access. It is binding throughout the Republic and to all sectors of the economic activity.*

11. The legal provisions that regulate Cartels provide the following:

   *Article 9.- Absolute monopolistic practices are contracts, agreements, arrangements, or combinations among competitive economic agents, whose *aim or effect are any of the following*:

   I. To fix, rise, to agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets, or to exchange information with the same aim or effect;

   II. To establish the obligation to produce, process, distribute, market or acquire only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services;

   III. To divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, by means of a determinable group of customers, suppliers, time or spaces; or

   IV. To establish, agree upon or coordinate bids or to abstain from bids, tenders, public auctions or bidding.

   The acts mentioned in this article will not have any legal effects and the economic agents engaged in such acts will be subject to the penalties established under this law, notwithstanding any criminal liability that may ensue.

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\(^8\) Article 38.
12. Based on these provisions, in order to be deemed responsible for violations to the FLEC, an economic agent should “act” in the Mexican market. On this regard, the CFC has considered that any economic agent that participates in an economic activity inside the Mexican territory, or an economic activity which has an effect in the Mexican territory, is subject to the FLEC.

13. Moreover, the last paragraph of Article 9 of the FLEC provides that any conduct considered an absolute monopolistic practice under the law (including all Hard Core Cartels) shall not have any legal effects in Mexico, notwithstanding where these conduct are carried out.

14. On the basis of this approach, the CFC has consistently considered that any economic agent that participates at any stage of the production process of any product which has an effect on the Mexican territory is subject to the FLEC and its sanctions.

15. For example, if foreign-based entities participate in the manufacturing, distribution, wholesale, or retail of a product, and any of them incurred in a conduct deemed illegal under the FLEC, which affects the Mexican market, the CFC may initiate a proceeding and sanction the corresponding entities. Even when complications may arise in order to notify or execute such decisions, this would not affect the legal standing of the decision.

16. The CFC would take into consideration how the implicated entities participated in the Mexican market, directly or indirectly, through a subsidiary, or if they do not have any participation at all, and would act consequently. In the 15-year experience in the field of enforcement, the CFC has pursued action against subsidiaries of the foreign entities directly related to an international Cartel. However, it has also sanctioned foreign-based firms when they do not have subsidiaries.

17. Under the FLEC, sanctions are applied considering the aim, or the effect of the corresponding regulated conduct. In this regard, the severity of the sanction would be considered with respect to the Cartel members’ intention to affect the Mexican jurisdiction, but would not affect the fact that such conduct must be sanctioned per se.

18. The same considerations would apply to the activities being carried out inside or outside the Mexican territory. The CFC must decide whether to sanction or not a conduct, based on the analysis of the arrangements or agreements being carried out in the Mexican territory. On the other hand, it would consider sanctioning the agents if their activities, regardless of where they were planned, agreed or executed, had an effect on Mexican markets.

19. The enforcement action will be indifferent as to the whether the conducts are carried out by the foreign-based entities directly or through subsidiaries. In this regard, it is important to mention that the Mexican Supreme Court of Justice recently decided on a case that implicated The Coca-Cola Export Corporation in an investigation concerning relative monopolistic practices, based on the interpretation of the “Economic Interest Group” to which this enterprise belonged. This concept has been used by the CFC for determination of responsibility based on societal, factual or commercial relationship among agents, each of them being considered as taking part in a prohibited conduct. The Supreme Court ruled the concept as constitutional and considered that any group of people, companies or entities, which have common commercial and financial interests and that coordinate their activities to achieve a common goal, may be considered an Economic Interest Group, and thus must be sanctioned for the group conduct.

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20. This Supreme Court’s decision allows the CFC to sanction conducts carried out by “groups”, thus piercing the corporate veil, both in national and international cases, and making it harder for companies to avoid responsibility because of a particular legal corporate arrangement.

21. The CFC also has powers to sanction individuals who participate in Cartel activities. The FLEC provides that individuals who participate directly in monopolistic practices, on behalf of a certain firm, shall be liable. Also, since 2006, and following an important amendment to the FLEC, sanctions may be imposed against those individuals who have induced, incited, helped, or participated in monopolistic practices.\footnote{The reform was based on best international practices and recommendations (i.e. OECD, Cartel Sanctions Against Individuals, Best Practice Roundtables for Competition Policy, 2003).}

22. Hence, the CFC will consider enforcement against individuals whose conduct fulfills those provisions of any economic agent that participates in an economic activity with an effect in the Mexican territory.

23. The CFC has the power to summon or impose sanctions on foreign-based companies, or individuals, and indeed it has done so in the past. It has a specific proceeding to deal with summons, accusations, and notification of sanctions against foreign entities and individuals. It is worth mentioning that the proceeding follows international principles, and provisions contained in Regional Trade Agreements or Bilateral Agreements signed by Mexico. Sometimes the proceeding may be lengthy and cumbersome.

24. As mentioned in section 1, criminal enforcement against companies or individuals has never been sought in Mexico for competition violations under the current provisions of the Federal Criminal Code. It is uncertain which proceedings may be sought by the corresponding enforcers for foreign-based individuals.

25. With respect to principles of international comity, the CFC has acted in line with such principles. When considering imposing penalties to companies that have been sanctioned outside Mexico for Cartel conducts, there is absolute respect for other jurisdictions’ enforcement actions. Collaboration on the basis of best international practices is taken into account by the CFC in its own decisions. This has happened in the cases discussed below.\footnote{OECD, Best Practices for the Formal exchange of Information between Competition Authorities in Hard Core Cartel Investigations, Best Practice Roundtables for Competition Policy, 2005.} However, the CFC will not take into formal consideration the amounts of the fines, or the severity of the sanctions being imposed by other jurisdictions when determining its own fines.

26. The CFC has tried to be consistent with best international practices regarding more severe sanctions. The methodology for the calculation of fines is based on the affected commerce and the need for proper disincentives for the industry participants. The FLEC has a capped maximum amount for all available fines including Cartel sanctions.\footnote{The maximum amount for a fine in a Cartel violation is around 8 million U.S. Dollars.} In general, where the net effect of the conduct for the participants is almost always higher than the fines, let alone other considerations, these amounts are very low and almost any Cartel sanction imposed is under the “optimal level” of fines.\footnote{See for example: Landes, W.M., “Optimal Sanctions for Antitrust Violations”, The University of Chicago Law Review, Vol. 59, 1983; Becker, Gary S. “Crime and punishment: an economic approach”, The Journal of Political Economy, Vol. 76, No. 2. 1968; Posner, Richard A., Economic Analysis of Law, 3rd Ed, Little, Brown & Co., 1986.} The CFC is actively
pursuing a change in the law to allow for the imposition of fines that could be capped by a given percentage of sales, or assets of the corresponding entity.

4. Private damages claims

27. Under Article 38 of the FLEC, private parties that are proven in a CFC proceeding to have suffered injury from an unlawful monopolistic practice or merger may sue the responsible parties in court to recover damages.

28. The court in such a proceeding may take into consideration the CFC’s estimate of the plaintiff’s damages. The FLEC’s Regulations provide that, after the issuance of the CFC’s final resolution, an injured party may request the CFC for an ancillary proceeding to estimate damages.

29. This proceeding does not prevent indirect purchasers to seek recovery of Cartel damages. However, indirect purchasers have not been active in the claim of damages. To the knowledge of the CFC, indirect purchasers have never attempted actions of this nature.

30. Under this provision, enforcement action by the antitrust agency must precede any attempt at a civil action. It is worth mentioning that there has been some discussion as to the need for the administrative procedure to end before affected parties can claim damages before civil courts based on the independent nature of both proceedings. However, this issue has never been considered by courts.

31. Currently, and with the participation of the CFC, a reform which allows class actions in Mexico has been promoted as an important initiative before congress which is also complemented by a Constitutional reform on this matter. If this initiative is approved, it would represent an enormous step towards improving the possibility of private litigation, and would expand the opportunity for enforcement of the Competition Law.

5. Cases investigated by the CFC

32. Since its creation, the CFC has not intervened in many cases in which jurisdiction issues have been discussed. However, some international Cartel cases have been investigated and sanctioned. Currently, the CFC is handling some important Cartel investigations with international implications. Below is a description of some of the most important cases handled by the CFC.

5.1 Advertising Agencies

33. In September 2003, information was brought to the attention of the CFC regarding an illegal agreement between two competitors for bid rigging on two international public procurement bids. These processes consisted of the acquisition, by the Council for the Promotion of Mexican Tourism, of publicity to promote Mexican tourism in two markets: Europe and South America.

34. The Council informed the CFC that personnel from the international advertising agency, Young & Rubicam Incorporation, was aware that its subsidiary, Young & Rubicam Madrid, S.L., based in Spain, agreed with an affiliate of another international organization based in Mexico, McCann Erickson de Mexico, S.A. de C.V., for the rigging of the bids put out by the Council. Specifically, Young & Rubicam


16 File IO-07-2003. McCann Erickson de Mexico, S.A. de C.V.
Madrid would decide not to participate in the bid for South America, if McCann Erickson de Mexico, chose not to participate in the bid for the European market contract.

35. Young & Rubicam Inc., its Spanish subsidiary and its employees participated with the CFC in the investigation, thus receiving leniency treatment in an investigation that involved the agreement between a foreign-based organization and a Mexican entity. As a result, McCann Erickson de Mexico was sanctioned by the CFC with a fine close to one million dollars.

5.2 Cartel in the Lysine Market

36. In 1996, following the well known international Cartel case in the Lysine market, the CFC had knowledge that the United States Department of Justice (DOJ) determined that Archer Daniels Midland Co. (USA), Ajinomoto Co., Inc. (Japan), Kyowa Hakko Kogyo Co., Ltd. (Japan), and Sewon America Inc. (Korea) conspired to fix prices and allocate the supply of the lysine sold in the United States and elsewhere.

37. The CFC took into account that Archer Daniels and Kyowa Hakko participated in the Mexican lysine market during the period in which this collusion took place, accordingly with their appearances before US Courts.

38. The CFC took into consideration that three companies participated in the Mexican lysine market directly: ADM Bioproductos, Fermentaciones Mexicanas (subsidiaries of Archer Daniels and Kyowa Hakko), and Helm de Mexico. From 1994 to 1996, the first two companies had 90 percent of the Mexican demand. Helm’s market share was considered marginal, and erratic. Hence, this company was not sanctioned.

39. In July 1996, the CFC initiated an ex officio investigation on the possible effects of the international price fixing arrangements in Mexico. During the investigation, it was found that ADM Bioproductos and Fermentaciones Mexicanas had fixed the price and the amounts of lysine supplied in the domestic market, as a consequence of the agreement carried out by Archer Daniels and Kyowa Hakko. The agreement between the Mexican subsidiaries gave rise to substantial parallel price increases in the domestic market.

40. Therefore, for engaging in absolute monopolistic practices forbidden by Article 9, Index I of the FLEC, the CFC imposed fines close to one hundred thousand dollars, and fifty thousand dollars, on ADM Bioproductos and Fermentaciones Mexicanas, respectively.

5.3 Cartel in the Citric Acid Market

41. After Archer Daniels Midland Company, Haarmann & Reimer Corporation and F. Hoffmann-La Roche Limited pleaded guilty before the US DOJ for participating in price fixing and market segmentation, and considering that these companies participated in the Mexican market, an investigation for Cartel conduct was initiated in the citric acid market.

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17 Although a formal leniency program did not formally exist at the time, the CFC had been working to implement it informally. Since June 2006, the general rules governing the competition leniency program are provided under the FLEC.
18 File IO-42-96. ADM Bioproductos.
20 File IO-14-98. Archer Daniels Midland Company.
42. The investigation led to the sanctioning of Archer Daniels Midland Company, Haarmann & Reimer Corporation and F. Hoffmann-La Roche Limited, all foreign-based entities, under the FLEC.

5.4 Other Cases

43. In other investigations, the CFC has requested information from foreign-based entities with no direct corporate links in Mexico. This experience has produced mixed outcomes, and sometimes has resulted extremely cumbersome. New standards for cooperation among competition agencies, the standardization of processes for cooperation by the Organization of Economic Cooperation and Development (OECD) and the work conducted in the International Competition Network (ICN) have proven to be useful.

6. Concluding Remarks

44. This note addresses the CFC’s approach in the enforcement of competition law in Mexico in the area of Cartels. The CFC has made it clear that the FLEC is applicable to all Mexican citizens, foreign nationals, and organizations when their activities, regardless of where they were carried out, had an effect on the Mexican market. Under no circumstance, in accordance to the FLEC, absolute monopolistic practices have any legal effects in Mexico, notwithstanding where these conducts are carried out.

45. The CFC has followed the principles of international comity in respecting the law and the formal decisions of competition authorities from other countries, and pursuing cooperation and communication on enforcement actions.

46. The CFC has followed best international practices both in the design and in the application of its competition law and is working to build even more avenues for cooperation based on its new enforcement tools such as its leniency program and its inspection powers. These efforts have started to bear fruit, in the perception of organizations and individuals, both nationally and abroad, who have begun to seriously consider the option of applying for leniency.

47. The CFC is taking important steps to increase competition enforcement in criminal prosecution and private actions. The push for civil actions and the participation of the CFC in a legislative initiative for class actions and the reform of the Federal Criminal Code for Mexico, are some important initiatives that would contribute towards the strengthening of competition policy in Mexico.