

Unclassified

DAF/COMP(2010)12/25



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

08-Jun-2010

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP(2010)12/25
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN MEXICO

-- 2009 --

This report is submitted by Mexico to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 16-17 June 2010.

JT03285087

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

English - Or. English

TABLE OF CONTENTS

Executive summary	3
1. Changes to competition law and policies, proposed or adopted.....	3
1.1 Summary of new legal provisions of the competition law and related legislation	3
1.2 Government proposals for new legislation	4
1.3 Other relevant measures, including new guidelines.....	4
2. Enforcement of competition laws and polices.....	5
2.1 Action against anticompetitive practices	5
2.2 Judicial Branch	7
2.3 Mergers and acquisitions	7
3. The role of the competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies	8
3.1 Regulatory reform and the OECD Competition Assessment Toolkit.....	8
4. Resources of competition authorities	10
4.1 Resources overall (current number and change over the previous year)	10
Annex 1	11

Executive summary

1. This report presents the most recent developments in competition law and policy in Mexico, and summarises some of the main enforcement, advocacy and self assessment activities that were conducted by the Mexican Federal Competition Commission (CFC or the Commission) in 2009.

2. Over the past years, amendments to the Federal Law of Economic Competition (FLEC) have been promoted. It is expected that the Mexican Congress will discuss these reforms in the year 2010 and, if approved, they will significantly strengthen competition policy in Mexico.

3. In 2009, 409 issues were resolved by the CFC. Mergers represented 39% of them; investigations of monopolistic practices (cartels) 9%; concessions, bids, and permits 36%; appeals for review 13%; consultations and requests 2%; and declarations 1%.

4. Every year, the CFC works closely with the Judicial Branch in order to explain its resolutions and defend them when appeals are presented by economic agents before the tribunals. In 2009, the CFC maintained a good record in defending its decisions, with a 75% of Commission's proceedings confirmed by the Judiciary.

5. Another key achievement was the drafting of several market studies within the framework of the OECD Competition Assessment Toolkit. These studies covered a wide range of sectors, such as transport; banking; telecom convergence; and pharmaceuticals, among others.

6. In April 2009, the Senate approved pro-competitive banking reforms proposed by the CFC based on the Toolkit studies of credit cards and deposit accounts. The main recommendations include, among other, ensuring customer mobility by establishing standards for the customer switching process. It is expected that in 2010 the Chamber of Deputies approves the final legislation.

7. In order to strengthen the CFC's leniency programme, it was conducted a public consultation, the first one ever carried out by the Commission, to identify economic agents' main concerns regarding the application of the programme; the information obtained has been used as input for the draft *Guidelines for Leniency Programme* that are scheduled to be published in 2010.

8. The CFC voluntarily applied to the OECD Competition Authority Capability Assessment (CA) during the last trimester of 2009. This evaluation represented a valuable exercise to confirm the improvement in the Commission's performance, and also helped identify key opportunity areas.

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

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

9. During 2009, no changes were made to the FLEC or its bylaw. Nevertheless, it is expected that during the first semester of 2010, President Felipe Calderon Hinojosa will submit Congress an initiative to reform the competition legislation currently in place.

1.2 Government proposals for new legislation

10. The reforms expected to be proposed by the President incorporate elements currently discussed by the Congress. These elements include changes aimed to:

- Strengthen the competition policy
 - *Sanctions.* Fines as high as 10 per cent of revenues and the possibility of prison for economic agents that collude to fix prices. It also proposed fines as high as 8 per cent of revenues for "relative monopoly practices" or unilateral conducts.
 - *On-site searches.* Allow the CFC to undertake on-site searches, and avoid complex bureaucratic procedures that facilitate the hiding or destruction of evidence of an illegal conduct.
 - *Cautionary measures.* Empower the CFC to order the ceasing of acts or conducts that may seriously harm the process of competition and free market access.
- Ease the law enforcement
 - *Settlement of an investigation procedure.* Economic agents under investigation will have the option to solve the competition problem prior to the agency issuing a statement of objections.
 - *Oral hearings.* The economic agent under investigation will have the possibility of offering oral hearings to the CFC's Plenum prior to the issuing of a resolution.
 - *Reduction of regulatory burdens associated with merger notifications.* Exempt certain type of mergers that pose no material risk to competition from the obligation to notify.
- Strengthen the institutional framework and operational capabilities of the CFC
 - *Joint dominance.* Consider in the law the possibility of reckoning substantial market power for more than one firm.
 - *Power for request information.* Formalise in the FLEC the information requests for market studies and opinions.
 - *Issuing guidelines.* Formalise in the FLEC the issuing of guidelines by the CFC to grant concessions, acquisitions and public infrastructure.
 - *Transparency.* Improve the information flow from the CFC to the society, in order to increase legal certainty for the economic agents.

1.3 Other relevant measures, including new guidelines

11. The leniency programme has gained importance as a tool for cartel detection and for obtaining information and evidence that otherwise would have been very difficult to obtain. Over the last three years, CFC has received nine leniency requests, and most of these were presented in 2009.

12. In order to strengthen this programme, in 2009, the CFC made a public consultation to identify economic agents' main concerns regarding the application of the leniency programme; this information has been considered in the draft *Guidelines for Leniency Programme* that are scheduled to be published in 2010.

13. Another relevant measure was the voluntary application to the OECD Competition Authority Capability Assessment (CA). The CA is an assessment process developed by the OECD which provides a consistent model to conduct self-evaluations and identify areas of opportunity where the authority would seek to improve.

14. The exercise gave the opportunity to critically assess the CFC's work and yielded a valuable insight about the Commission's weaknesses, strengths, and areas of opportunity. This methodology will be used in the following years to assess CFC's performance and constant progress.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices

15. The CFC has the mandate to protect the competition process and free market access by the prevention and elimination of monopolistic practices and other restrictions to market efficiency.

16. This mandate is explicitly stated in the FLEC and covers merger control, e investigations of monopolistic practices, and participation in the design of the allocation process for concessions, permits, and public bids.

17. In 2009, the CFC solved 409 cases out of a total of 481 it initiated. The cases solved include 38 investigations of monopolistic practices; 161 mergers notifications; 145 cases related to concessions, bids, and permits; 52 appeals for review; 5 declarations; and 8 consultations and requests about competition process and free market access. The complete breakdown can be seen in Annex 1.

2.1.1 Monopolistic practices

18. Monopolistic practices are those that, due to their objective or effect, damage or prevent the process of competition and free market access in production, processing, distribution and marketing of goods and services. The FLEC considers two types of monopolistic practices: relative (unilateral conducts) and absolute (cartels).

19. The number of investigations of monopolistic practices and mergers solved by the Commission in 2009 amounted to 199.

2.1.2 Summary of significant cases

- Relative monopolistic practices in the pay television market

“Cable California, SA de CV” (Cable California) and two persons that have concessions to operate pay television networks filed a claim against “Productora y Comercializadora de Televisión, SA de CV” (PCTV) for refusing to distribute and transmit certain TV signals. PCTV is the main supplier of TV signals for restricted-access television system.

In its investigation, the CFC determined that PCTV has substantial market power in the wholesale marketing of TV signals for restricted-access television systems, and proved that PCTV refused to deal in the state of Veracruz causing the displacement of its competitors in this market.

In reaction to the Commission's decision, PCTV committed to restore the competition process and free market access by reforming its statutes to facilitate PCTV membership; the issuance of guidelines for the acquisition of TV signals; and the publication of membership fees and annual signal rates. The CFC accepted these commitments.

- Absolute monopolistic practice in the Mexican Railway System

In November 2005, the CFC was notified about the intention to merge between Ferromex and Ferrosur, two of three main companies that own concessions for railway freight transportation services in Mexico.

Hours after the notification, however, the companies carried out the merger without waiting for the CFC's approval.

In June 2006, the CFC decided not to authorise the merger because it would lead to excessive concentration in the railway freight market, and would harm its efficiency and consumers of service. Also, in 2006, the CFC started an investigation for possible absolute monopolistic practices, which involved the exchanged of information for price fixing in the national market. It should be noted, in this regard, that from a legal standpoint, companies were still competitors, and were subject to the FLEC as independent companies.

The CFC's investigation found sufficient evidence to prove co-ordination and information exchanges with the aim to fix prices. Thus, in January 2009 the Plenum of the CFC determined that the companies were responsible for collusion and were sanctioned with a \$419 million pesos fine in total (approximately US\$32 millions).

- Absolute monopolistic practice in the provision of professional services in the Real Estate Market

In May 2007, "Bella Vista Chapala SA de CV" (Bella Vista Chapala) filed a complaint against "Grupo Inmobiliario del Lago, AC" (GIL) and the Mexican Association of Real Estate Professionals, Section Chapala (AMPI Chapala), for possible absolute and relative monopolistic practices.

The complainant alleged the existence of an agreement between real estate agents associated to GIL for charging equal fees in the provision of professional services in the real estate market in the region of the state of Jalisco. In addition, it stated that AMPI Chapala denied membership to estate agents who were not associated with GIL.

In the course of the investigation, a real estate agent presented to the CFC a leniency application (the first since the establishment of this procedure in 2006). The information obtained from this applicant, together with that gathered during the investigation, allowed the CFC to demonstrate:

- The existence of operational rules for GIL partners, through which the real estate agents fixed commissions on the sale prices of real estate.
- The Existence of a "Commissary" that monitored the compliance of the operational rules by the partners, and was responsible for issuing fines or taking disciplinary action when violations to the rules occurred.
- Co-operation of AMPI Chapala to implement the agreement through conditioning the admission or membership renewal to their affiliates.
- Elimination of the competition which caused higher prices for the consumers.

In December 2009, the CFC resolved to sanction both economic agents with a total fine of \$24 million pesos (approximately US\$2 millions).

2.2 *Judicial Branch*

20. In Mexico, an economic agent can not only appeal before the courts the CFC's decisions but can also challenge their constitutionality by filing an "amparo" suit before a Federal District Court.

21. Since the creation of the CFC, "amparos" have become the main legal recourse to challenge the CFC's decisions. Since 2007, the record of "amparos" won by the CFC is above 75 per cent. This is the result of the CFC's efforts in two fronts. First, the careful observation of essential procedural formalities; and second, the Commission's endeavour to promote understanding of economic and competition issues the Judicial Branch.

22. In 2009, the Courts confirmed 42 out of 56 proceedings of the CFC. Seven of the confirmed decisions established that the CFC's resolutions observed the constitutional rights of the appellant.

2.2.1 *Summary of a significant case*

- Substantial market power in the telecommunication sector

In November 2007, the CFC initiated an ex-officio procedure assessing the level of competition in the markets for termination services in telephony within the calling party pays regime. Following the procedure established in the FLEC, in June 2008 the CFC issued a preliminary ruling and, opened a receiving pleading from the economic agents with an interest in the procedure.

In reaction, Telecomunicaciones del Golfo, S.A. de C.V. undertook a legal recourse to challenge the CFC's preliminary ruling, that reached three levels of the Judiciary:

- First, an appeal before a District Court that was dismissed with the observation that the ruling did not affect the legal interest of the appellant;
- Second, a revision of this District Court resolution by an Administrative Tribunal which settled the CFC's preliminary ruling, but sent the case to the Supreme Court for the revision of the constitutionality of Article 24, Section V of the FLEC; and
- Third, the revision of this constitutionality by the Supreme Court that confirmed the CFC's powers granted by Article 24, Section V to investigate and rule on effective competition conditions, and the existence of substantial market power.

With this resolution, the Judiciary not only confirmed the Commission's powers given by Article 24, but also confirmed the authority of the CFC's Plenum to issue a preliminary ruling on this matter.

2.3 *Mergers and acquisitions*

23. Merger control is the key preventive function of the Commission to protect competition and free access to markets. The CFC has the exclusive powers to assess mergers, acquisitions, or any other act through which corporations concentrate in all economic sectors in Mexico.

24. During 2009, the CFC resolved 161 merger cases: 68 restructuring notices and 93 merger notifications. Among the latter, 87 were authorised since they did not represented a risk to competition; 2 were blocked; and 5 approved with conditions. In 1 case, the agents declined to continue with the transaction a few hours before it was discussed in the Plenum.

2.3.1 *Summary of significant cases*

- Mexichem, SAB de CV / Plásticos Rex, SA de CV

In 2009, Mexichem, SAB de CV (Mexichem) proposed the acquisition of 100 per cent of assets from Policyd, S.A. (Policyd), Plásticos Rex, S.A. de CV (Plásticos Rex) and its subsidiary companies.

For this transaction the Commission assessed the markets where the companies involved in the notified merger overlapped: the production and sale of high-density polyethylene pipe, PVC emulsion, PVC pipe fittings, suspension/mass PVC resin and PVC pipe.

It was found that the suspension/mass PVC resin and PVC pipe markets have a national geographic dimension, and that if the merger was approved, it would have created an economic agent with substantial market power in the production of suspension/mass PVC and in the PVC pipe market.

Also, the Commission considered that the market of PVC pipe had some barriers to entry like: the significant investment costs to establish one or several production plants; the start-up times; and the economic impediments to substitute the main input.

In addition, the merger would have granted Mexichem with the ability to unilaterally impose prices and to limit the supply to customers and/or competition in the production and/or sales of PVC pipe.

Therefore, the Commission decided not to authorise this operation because it represented a risk to competition and would lead to an excessive market concentration in the relevant markets.

- Pfizer / Wyeth

In 2009 Pfizer, Inc. (Pfizer) notified its intention to acquire all the international assets of Wyeth.

The CFC established the companies involved in the notified merger overlapped in several products in the markets of human and animal health in Mexico. In the latter, the Commission considered the proposed merger would have granted resulted Pfizer the power to unilaterally set prices or significantly restrict the output and that competitors would not be able to neutralise this power.

Therefore, the Commission decided to authorise the merger with the condition to divest the businesses related with the affected markets in Mexico, including the divestiture of assets associated with Wyeth products.

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

3.1 *Regulatory reform and the OECD Competition Assessment Toolkit*

25. Since 2007, the Ministry of the Economy, the CFC, and the Competition Division of the OECD have worked in the implementation of a special project called “Process for the Strengthening of the Regulatory Framework for Competitiveness” (Competition Assessment Toolkit). The outcomes produced so far by this project include a significant number of proposals for pro-competitive reforms to the regulatory framework, aimed at removing distortions to the efficient functioning of markets that are key for economic performance and the welfare of the population.

26. This work involved the development of a series of market studies carried out by several well known academics co-ordinated by the Directorate-General for Economic Studies of the CFC. Based on these studies, the work also involved the formulation of concrete proposals for pro-competitive reform as well as the provision of technical support to other areas of the federal Government and Congress for the implementation of the reforms.

27. The markets that have been assessed through this project up to the year 2009 are:

3.1.1 Completed studies

- *Foreign trade:* It proposed simplification of customs procedures and tariff structure. These recommendations led to an ambitious programme of deductibility by the Ministry of Economy in December 2008. The proposals on Customs have been taken partly by the Mexican Treasury.
- *Telecommunications:* The CFC is working with the Ministry of Communications and Transport to ensure the inclusion of the recommendations in the determination of interconnection rates in telephony services. Implementation of these recommendations will render benefits estimated by ten billion dollars a year for consumers. Additionally, recommendations on the allocation of radio spectrum were included in the terms of spectrum auction that will be carried out in the first half of 2010.
- *Technical Standards:* The application of the method for assessing the competitive effects of regulation facilitated the identification of problems in 15 per cent of a sample of 120 Mexican standards.
- *Pharmaceutical Market:* The study provided recommendations aimed to accelerate the adoption of generic drugs that could generate benefits for consumers that amount 2.8 billion millions of dollars a year.
- *State regulation:* Based on the successful experience of Australia, the study provides recommendations for the implementation of pro-competitive reforms to state regulatory frameworks.
- *Competition and income distribution:* The study calculates the effect of lack of competition in consumers' income. The results are currently being analysed in the Ministry of Social Development.
- *Banking Sector:* During 2009, the Congress passed a reform to the banking system in Mexico. This reform incorporated the CFC's recommendations developed within the framework of the Competition Assessment Toolkit. These recommendations aimed at increasing competition and improving market performance without compromising market penetration and decreasing concentration and price levels.

More specifically, these recommendations promoted:

- Increase transparency: To facilitate customer mobility by requiring banks to provide an information package about customer accounts; to allow banks to act in the name of switching customers; and to establish standards on customer switching process.
- Access to essential infrastructure: To guarantee competitive access by establishing minimum standards to access the underlying switch networks.

- Promote competitive interchange fees: To make transparent the Bank of Mexico's role in setting the interchange fee and having as an objective promotion of efficient growth of the market.
- Eliminate excessive requirements for branch banking.

3.1.2 *Studies in progress*

- *Electricity*: For identifying regulatory barriers for the penetration of efficient auto-generation schemes; and for making recommendations to facilitate this penetration.
- *Airlines*: It analyses the effect on the prices of new entry competitors, as well as barriers to entry. Recommendations are made on the pro-competitive allocation of slots at the international airport of Mexico City
- *Bus passenger transport*: It analyses access to terminals as the possible main barrier to the entry.

28. At the end of 2009, the institutions involved in the Competition Assessment Toolkit jointly developed a renewal proposal aimed for the implementation of the second phase of the project.

4. Resources of competition authorities

4.1 *Resources overall (current number and change over the previous year)*

29. The Commission does not have complete budgetary autonomy; the Ministry of the Economy negotiates its own budget, and that of the CFC, with the Finance Ministry, and with Congress.

30. In 2009, the CFC's budget was \$171.8 million pesos (approximately US\$13.5 million).

31. The Commission had 169 staff in 2009, out of which 101 were non-administrative staff and exclusively worked on competition enforcement. There were 31 lawyers, 35 economists and 35 who have other background (such as social sciences, mathematics, engineering, and business administration).

4.1.1 Annual Budget of the CFC in 2009

		Change over previous year
Approved budget in local currency	\$171.4 million pesos	-\$10.247 million Mexican pesos
Approved budget in USD	\$13.5 million USD*	

* Average exchange rate in 2009 was 12.725 Mexican pesos per dollar

4.1.2 Number of employees (person-years) as of December 31, 2009

		Change over previous year
Economists	35	-5
Lawyers	31	+2
Other professionals	35	+3
Support staff	68	+3
All staff combined	169	+3

ANNEX 1

FEDERAL COMPETITION COMMISSION
Files concluded in 2009

	2009
TOTAL	409
MERGERS	161
Restructuring notices	68
Notifications	93
Authorised	87
Closed	0
Not Authorised	2
Withdrawn	1
MONOPOLISTIC PRACTICES AND OTHER RESCTRCTIONS TO COMPETITION	38
Complaints	37
Discarded	22
Not submitted	4
Closed	4
Summoned	4
Withdrawn	0
Ex-officio investigations	1
Closed	0
Summoned	1
CONCESSIONS, BIDS, AND PERMITS	145
Concessions	89
Opinions about transfer concessions	28
Opinions about new concessions	61
Bids	52
Permits	4
APPEALS FOR REVIEW	52
Revoked	1
Confirmed	21
Discarded	30
CONSULTATIONS AND REQUESTS	8
Consultations	8
Requests	0
DECLARATIONS	5
Discarded	0
Not submitted	0
Declaration issued	4