

Mexico's Tough New Approach To Antitrust Enforcement

Law360, New York (June 6, 2011) -- On May 10, Mexico's President Felipe Calderón signed into law various reforms to Mexico's Federal Law on Economic Competition,[1] which he touted as providing a "robust" legal framework for an "attack" on anti-competitive conduct.[2]

The president explained that these reforms give Mexico's competition authority, the Federal Competition Commission, or CFC, expanded powers and "teeth" to sanction companies involved in anti-competitive practices.[3]

The words of the statute certainly confirm the president's claim. The main reforms include (1) introducing new types of conduct deemed anti-competitive under the law; (2) instituting criminal penalties and increasing sanctions for anti-competitive conduct; (3) expanding the CFC's tools to carry out its investigations; and (4) enhancing transparency in and streamlining the merger control and CFC review processes.

In particular, the much wider authority to conduct dawn raids, the introduction of criminal punishments against individuals, and increased fines all suggest that Mexico is poised to match the powerful, aggressive cartel enforcement regimes of its North American Free Trade Agreement partners, the U.S. and Canada. Other important procedural and substantive reforms are also included in the new law.

Legislative History of the Reforms

The reforms to the Federal Law on Economic Competition[4] were part of a bill originally submitted to Congress over a year ago by Calderón.[5] The proposed reforms generated much public debate, raising concerns from powerful companies and economic groups.[6] In spite of these concerns, both houses of Congress voted unanimously in favor of the bill.[7]

Expanding the Scope of Prohibited Anti-Competitive Conduct

The reforms expand the types of practices and conduct prohibited under the law. The law bans two types of "abuses of dominance" — absolute monopolistic practices and relative monopolistic practices. "Absolute" monopolistic practices involve contracts, agreements, and arrangements, among competitors, having the aim or effect of fixing prices for the sale or purchase of goods and services;

setting the supply or demand for goods or services; dividing current or potential markets; or coordinating bids for public procurement contracts.[8]

“Relative” monopolistic practices are business actions or decisions, taken by one or more individuals or entities, having the intent or effect of illegally displacing other individuals or entities from the market, substantially hindering their access, or favoring one or more individuals or entities with exclusive advantages.[9]

Relative monopolistic practices include, for instance: imposing or setting vertical restrictions or prices; selling tied goods; refusing to sell or purchase goods available to competitors; offering loyalty discounts; price discrimination; boycotting; predatory pricing; and increasing a competitor’s costs or hindering their access to the market.[10]

Previously, the law only punished “abuses of dominance” by one firm with market power.[11] The reforms introduced the concept of “joint dominance” or “joint substantial market power,” so that the law now prohibits two or more firms, who act “in concert” and participate in “abuse of dominance practices.”[12]

Introducing Criminal Penalties and Increasing Sanctions

The changes increase the penalties for individuals and corporations found to have committed anti-competitive acts. The recent legislative reforms introduced criminal sanctions for individuals convicted of an absolute monopolistic practice. Anyone found engaging in an absolute monopolistic practice, for example by forming a cartel or engaging in price fixing, is subject to punishment by three to ten years in prison.[13]

The changes also significantly increase the caps on fines for anti-competitive conduct.

Prior to the reforms, an entity engaging in absolute monopolistic practices faced a fine of up to 1.5 million times minimum wage, and the fine was capped at approximately US\$7.2 million for the first offense.[14] However, the reforms increase this penalty to 10 percent of the violator’s annual sales or of the value of its assets.[15]

The fine for engaging in a relative monopolistic practice is increased, from the law’s previous cap of approximately US\$4.5 million, to 8 percent of the entity’s annual sales or value of its assets.[16]

Prior to these modifications, both of these increased penalties had been reserved for repeat offenders only.[17]

Strengthening the CFC's Investigative Powers

The reforms also strengthen the CFC’s powers to conduct investigations. Prior to the reforms, the commission was forced to announce visits to a company’s premises in advance.[18] In addition, the CFC was only permitted to search for documents that it had previously requested from the company.[19]

Essentially, the commission was unable to conduct unannounced inspections to recover evidence and documents.

The chairman of the CFC, Eduardo Pérez Motta, stated that the searches were “practically useless,” and the CFC’s advance notice allowed companies to destroy relevant evidence before the investigators arrived.[20] The reforms grant authority to CFC to conduct surprise visits, such as dawn raids, to carry out its investigations, as long as the information that the authorities collect is relevant to competition issues.[21]

Streamlining and Providing Transparency to CFC Review

Finally, the recent reforms provide transparency and greater efficiencies to the merger control process. The CFC must now publish general guidelines (i.e., technical criteria) every five years to accompany its regulations, including how to calculate administrative fines, as well as to define the relevant market and substantial market power.[22]

The reforms also shorten the notification periods for proposed mergers, thereby expediting the review process.[23]

Finally, the changes reduce the scope of premerger filing requirements.[24] For example, corporate restructuring transactions among entities under common control, without any third parties involved, are exempt from the notification requirements.[25]

The changes also streamline CFC review of matters other than merger control. For instance, the reforms permit out-of-court settlement of antitrust cases, a procedure that formerly was practically impossible.[26]

Furthermore, the CFC can now order injunctive relief for conduct that may result in “irreversible damage” to the competitive process.[27] Previously, the commission lacked any power to enjoin abusive conduct.[28]

Finally, parties subject to CFC’s final resolutions may invoke a formal review process before a new and specialized court.[29]

Likely Impact of the Reforms

These changes will likely have their greatest impact in the area of cartel enforcement. Mexico’s cartel enforcement regime has lagged significantly behind the U.S.[30] and Canada[31] on just about every metric — frequency and success of prosecutions, amount of total fines imposed, effectiveness in deterring anti-competitive conduct, and number of leniency applications — because it did not have the tools commonly used elsewhere to investigate and successfully challenge cartel behavior.

These reforms may meaningfully change this record and close the gap between Mexico and its main trade partners, if the new framework is accompanied by budgetary and interinstitutional support for

enforcement.[32]

Because of the volume of trade that passes between the U.S. and Mexico, if the CFC puts these new tools to work in much the same way that Canada has, Mexico will likely become much more involved in global and regional price-fixing enforcement initiatives that impact North America.

Companies doing business in North America that discover that they are engaging in antitrust misconduct will now have to consider their exposure in Mexico, in addition to their potential liability in the U.S. and Canada.

Conclusion

These recent changes to the law provide the Mexican competition authorities with significantly more power to investigate and punish those engaged in anti-competitive behavior.

Even without these reforms, in April 2011, the CFC was able to fine Telcel, the local mobile unit of telecommunications giant America Movil SAB, approximately US\$1 billion — the highest fine in the commission's history.[33]

The Telcel fine demonstrates the CFC's willingness to punish antitrust violations, and the enhanced powers and expansive scope of the new legislative reforms enhances their ability to do so, as well.

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[1] Decreto de la Ley Federal de Competencia Económica, del Código Penal Federal y del Código Fiscal de la Federación [LFCE], Diario Oficial de la Federación [DO], 10 de Mayo de 2011, available at <http://www.cfc.gob.mx/images/stories/Noticias/Comunicados2011/decretoreformaslfce.pdf>.

[2] Discurso del Presidente Felipe Calderón Hinojosa, El Presidente Calderón en el Anuncio de Mejoras Del Sistema de Regulacion de la Competencia Economica en Mexico (May 9, 2011), available at <http://www.presidencia.gob.mx/2011/05/el-presidente-calderon-en-el-anuncio-de-mejoras-del-sistema-de-regulacion-de-la-competencia-economica-en-mexico/>.

[3] Id.

[4] The Federal Law on Economic Competition first entered into effect in 1993, as Mexico was preparing to enter into NAFTA. While Mexico had a general ban on anti-competitive behavior prior to the

enactment of the law, the federal government's involvement in all facets of the economy made enforcement of the law difficult. While the law was primarily modeled on U.S. antitrust law, there were significant differences in the two countries' application and enforcement of their laws due to their respective statutory schemes. These differences were particularly meaningful given the substantial volume of trade between the two countries. As a result, Mexico's law was amended in 2006 in an effort to address some constitutional concerns and to bring it up to date with best international practices. Some of those changes included increasing the amount of the administrative fines, which were low in comparison to international standards; reducing administrative burdens in the merger review process; and creating a leniency program and special procedure to settle abuse of dominance cases. However, these changes fell short of U.S. antitrust standards. See Miguel Flores Bernes, Francisco Fuentes-Ostos & Christian Lippert Helguera, Legislative Reform, Merger Notification Thresholds and Immunity Guidelines, ABA Section of Int'l Law, Int'l Antitrust Comm. Newsletter, at 4 (Apr. 2011), available at <http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/NewsletterApril2011.pdf>; Harve A. Truskett, This Does Not Matter In Mexico: Mexico-U.S. Competition Law — Conflicts and Resolutions, 30 Hous. J. Int'l Law 779 (2008).

[5] Rosalind Donald, An Interview with Eduardo Pérez Motta, *Global Competition Rev.*, May 3, 2011, available at <http://www.globalcompetitionreview.com/news/article/30068/an-interview-eduardo-perez-motta>.

[6] Id.

[7] Id.

[8] CFC, Prácticas Monopólicas Absolutas, <http://www.cfc.gob.mx/index.php/¿QUE-HACEMOS/practicas-monopolicas-absolutas.html>.

[9] CFC, Prácticas Monopólicas Relativas, <http://www.cfc.gob.mx/index.php/¿QUE-HACEMOS/practicas-monopolicas-relativas.html>.

[10] Id.

[11] Id.

[12] Bernes et al., *supra* note 4.

[13] Decreto, *supra* note 1, at Artículo 254 bis.

[14] Rosalind Donald, Mexico Closer To Competition Law Reform, *Global Competition Rev.*, Apr. 18, 2011, available at <http://www.globalcompetitionreview.com/news/article/30018/mexico-closer-competition-law-reform>.

[15] Decreto, *supra* note 1, at Artículo 35.

[16] Id.; Donald, supra note 16.

[17] See generally Secretaría de Economía, Emergence of a New Competition Law in Mexico, NAFTA Works Newsletter (May 2011), available at <http://www.naftamexico.net/wp-content/uploads/2011/05/may11.pdf>; Donald, supra note 5.

[18] Id.

[19] Melissa Lipman, Plan to Add Muscle To Mexican Antitrust Law Advances, Law360, Apr. 15, 2011, available at <http://www.law360.com/articles/239415>.

[20] Donald, supra note 5; see also Lipman, supra note 9.

[21] Decreto, supra note 1, at Artículo 31.

[22] These general guidelines must also provide guidance in areas outside of the merger control process, including detailing the injunction process and the initiation of a criminal prosecution. Id., at Artículo 24, XVIII bis.

[23] Id., at Artículo 21.

[24] Id.

[25] Id., at Artículo 21, bis 1.

[26] Id. at Artículo 33, bis 2; see also Donald, supra note 5.

[27] Decreto, supra note 1, at Artículo 34, bis 4.

[28] Bernes, et al., supra note 4.

[29] Decreto, supra note 1, at Artículo 39.

[30] In 2009, U.S. authorities led the way in international cartel enforcement with more investigations, pleas, fines and prison sentences than any other jurisdiction. In 2010, the only region or country to meet the U.S.' level of criminal antitrust enforcement was the EU. David P. Burns & Rebecca Justice Lazarus, A Review Of 2010 Criminal Antitrust Enforcement, Law360, Feb. 4, 2011, available at <http://www.law360.com/articles/221754/a-review-of-2010-criminal-antitrust-enforcement>. Recently, the U.S. Department of Justice's Antitrust Division has witnessed a tremendous upsurge in international cartel activity, so U.S. enforcement agencies have placed a strong emphasis on combating international cartels that target U.S. markets. Of the approximate \$6.1 billion in criminal antitrust fines imposed by the U.S. antitrust enforcers between FY 1997 and the end of FY 2010, approximately 96 percent were imposed in connection with the prosecution of international cartel activity. Antitrust Div., U.S. Dep't of Justice, Congressional Submission — FY 2012 Performance Budget (2011), available at

<http://www.justice.gov/jmd/2012justification/pdf/fy12-atr-justification.pdf>.

[31] Cartel enforcement has always been a high priority for Canadian antitrust authorities. For instance, in 2009 and 2010, 10 individuals and six companies pled guilty in a price-fixing cartel involving the retail gasoline industry, with fines totaling over \$2.8 million and sentences for six of the 10 individuals totaling 54 months. Canadian cartel enforcement benefits to a high degree from international cooperation, which has been strengthened over the years by the International Competition Network and the close working relationship between the Canadian Bureau and U.S. antitrust authorities. Anthony F. Baldanza, Laura F. Cooper, Huy A. Do & Paul J. Martin, "Canada: Cartels," *Antitrust Rev. of the Americas* 2011 § 4 (Oct. 2010), available at <http://www.globalcompetitionreview.com/reviews/29/sections/104/chapters/1145/canada-cartels/>.

[32] Alejandro Schtulmann, head of research at Emerging Markets Political Risk Analysis in Mexico City observes, that "[t]he lack of competition in key sectors of the economy and the persistence of monopolies in the public sector is one of the country's most acute structural problems, contributing to the high costs that make it difficult to do business in Mexico and stifle economic growth. Under the current conditions, competition has been artificially limited in a number of strategic areas such as telecommunications and banking — where tariffs count among the highest in the world. As a result of such dominant market positions, Mexicans generally pay considerably more for products and services than consumers in any other country in the region." A study by Carlos Ursa of the Federal Competition Commission estimates that "monopolistic practices raise prices by 30 to 40 percent in the controlled markets, which amounts to about 7 percent of monthly spending for the poorest families." Iker I. Arriola Peñalosa, *Mexico Antitrust Reform: Bleak Outlook*, *Latin Bus. Chron.*, Apr. 22, 2010, available at <http://www.latinbusinesschronicle.com/app/article.aspx?id=4133>

[33] Anthony Harrup, *Mexico's Senate Approves Changes in Competition Law*, *Wall St. J.*, Apr. 28, 2011, available at <http://online.wsj.com/article/SB10001424052748704330404576291644040999126.html>.

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