Mexico – A few steps towards eliminating impunity

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The legal framework regulating antitrust matters in Mexico is limited to Article 28 of the Mexican Constitution, the Federal Law on Economic Competition (the "Law") and its Regulations.

In this regard, the Federal Law on Economic Competition (the "Law") was issued in 1992, and was first amended in 2006. Nevertheless, the amended wording quickly became insufficient to guarantee compliance of its purpose, and was unable to guarantee economic actors a fair and faithful competition within national markets. As a result, consumers have not been able to enjoy the benefits of healthy competition, thereby paying excessive prices for several products and services.

The aforementioned wording of the Law remained effective up until May 2011, when the executive and legislative powers in Mexico joined efforts in order to draft and approve several amendments to the Law and other related provisions (the "Amendment"). These modifications aim to create a legal framework that will allow fighting efficiently against anticompetitive conduct within national markets, and therefore increase competitiveness, productiveness and economic growth in Mexico.

The specific purposes of the Amendment may be summarized as follows: (i) to strengthen the Federal Competition Commission as the entity protecting competition and consumer welfare (the "Commission"); (ii) to achieve more transparency and constant evaluation within the Commission, as well as to simplify proceedings; and (iii) to regulate provisional remedies that may be sought during proceedings to avoid irreversible damages to competition, as well as to provide effective sanctions that dissuade economic agents from carrying out anticompetitive conduct.

Several important modifications are provided by the Amendment. Amongst them, we may find provision for the concept of "joint dominance", in order to address such situations where two or more economic agents may jointly hold a dominant position within a relevant market, without any of them holding such dominant position individually.

Likewise, we may now find a clear and logical structure regarding those transactions that require notification under merger review proceedings, transactions that are entitled to a simplified proceeding and transactions that shall not be subject to any notice whatsoever.

Notwithstanding the importance of the aforementioned changes, there are certain modifications that deserve more attention due to their relevance and impact in economic agents' and consumers' day-to-day activities and transactions. As a result thereof, and in the best interest of the reader, this article focuses exclusively on those modifications to provisions that regulate investigation and administrative proceedings, as well as modifications to those adjustments to the penalties that arise from breaching the Law.

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1. AIMING FOR A FAIRER AND MORE EFFICIENT PROCEEDING

Before addressing the importance of the modifications brought about by the Amendment, the following clarification shall be made: antitrust proceedings in Mexico may be divided into two stages: i) investigation, and ii) administrative proceeding. In this regard, once the investigation has concluded, and if there is evidence from which the probable responsibility of the economic agent may be assumed, the Commission starts an administrative proceeding against such economic agent where arguments and evidence deemed advisable are filed. This administrative proceeding concludes with a final resolution from the Commission that establishes the existence or inexistence of violations to the Law and, if applicable, provides the corresponding sanction.

The whole proceeding (investigation and administrative proceeding) has been and is still conducted, even after the Amendment, before the Commission, unlike other countries, where one authority is in charge of the investigation, and another decides upon (adjudges) the existence of anticompetitive conducts.

In this regard, the Amendment shows an effort to guarantee impartiality and legitimacy within the proceeding, by assigning (i) the investigation stage, as well as the filing of the administrative proceeding, to the Executive Secretary of the Commission; (ii) the preparation of a draft resolution to one of the Commissioners (appointed on a rotational basis); and (iii) the final resolution, to the Plenary Session of the Commission.

It has been said that this provision intends to avoid monopolization of decisions, and generates a healthy game of weights and counterweights (checks and balances). Nevertheless, this segregation is only partial, since officers in-charge belong to the same authority, and as a result, the purpose to achieve impartiality may not be adequately achieved through this modification.

1.1 Investigation

1.1.1 Dismissal of Complaints

Since the Law was issued in 1992, it has provided the Commission's (now the Executive Secretary's) authority to dismiss those complaints regarding monopolistic practices that are deemed as evidently unacceptable. Nevertheless, it was not until the publication of the Amendment that the resolution dismissing the complaint could be challenged before the Plenary Session of the Commission.

Even though the intention to provide claimants with an instance to challenge a decision that was previously unchallengeable is praiseworthy, it must not be disregarded that both the Executive Secretary and the Plenary Session of the Commission are part of the same authority, that is, the Commission, and in this regard, experience within administrative law has shown that authorities have a tendency of confirming their own decisions.

1.1.2 Inspection Visits

One of the most significant achievements of the Amendment refers to the new provisions regarding inspection visits or "dawn raids".

Prior to the Amendment, the Law provided that inspection visits could only refer to information and documents previously requested by the Commission, during an investigation proceeding. This meant that the only purpose of an inspection visit could be to obtain such documents and information that the Commission had already requested and was not furnished with; as a result, no additional documentation deemed relevant could be requested or obtained during an inspection visit.

This provision was quite absurd and deprived inspection visits from their purpose which consist of using the element of surprise, in order to obtain as much evidence as possible. Investigated parties had knowledge of which documentation the Commission had requested and therefore, of which documents it could obtain from an inspection visit. As a result, investigated parties could possibly carry out necessary adjustments to such documents in order to conceal any misconduct.

In this regard, the Commission had to guess, from the very onset, which documents would contain evidence of anticompetitive conducts and request for them during the course of the investigation, with no other assistance but the intuition of its officers, since such documents were the only ones it could use to try to figure out whether a breach to the Law existed or not. (suggest breaking this into two sentences)

The Amendment has eliminated this requirement, and inspection visits may now refer to any document or information related to the investigation, that the Commission deems relevant for such purposes. This modification is quite accurate, since the Law no longer represents an obstacle for the Commission to collect as much evidence as it possibly can, in order to determine the existence of anticompetitive conduct.

Before the Amendment was approved, inspectors carrying out an inspection visit could visit any of the investigated party's domicile(s) to notify them of the inspection visit, and in the event the investigated party or legal representative thereof was not present, the inspectors would leave a summons and the inspection visit would be carried out the next day. This was extremely unpractical, and an obstacle for the Commission to exercise its authority efficiently, since the investigated party was given a whole day to "clean up" before the inspection visit took place.

The Amendment suppresses the aforementioned notice, and now the inspectors may carry out inspection visits the moment they arrive, only by identifying themselves and showing the visitation order previously approved by the Plenary Session of the Commission.

Together with the Commission's power to request for any information deemed relevant, this is probably the most relevant modification brought about by the Amendment, since inspection visits will not serve as warnings for investigated parties as to when and which information will be requested by the authority; they will become a true vehicle to obtain accurate information that may help define whether the Law has been breached or not.

Also, with regard to inspection visits, the provision defining the scope thereof is clarified, and as a result, investigated parties are bound to grant inspectors access to premises, allow the inspection visit, and provide all documents and information related to its subject matter, for purposes of which, access to offices, computers, electronic devices, storage devices, files and any other real estate or media that may hold evidence regarding forbidden conducts shall be granted.

In addition, the Commission may now use the assistance of the police force to achieve its purpose, as well as to mark or stamp seals on information, documents, offices and other media, that may provide evidence of the practice of forbidden conducts, or order for it to remain in deposit, in order to assure availability of such information.

Prior to the Amendment, refusing access to inspectors would allow investigated parties to avoid the aforementioned consequence. The Amendment brings a great advance in this regard, which is quite praiseworthy. In order to dissuade investigated parties from refusing access to inspectors carrying out an inspection visit, several penalties, including fines, working days for the community, and even prison, now arise from the aforementioned refusal.

All of the aforementioned modifications have granted the Commission almost total access to the investigated parties' information and documents, in order to determine the existence of anticompetitive conducts. Access to information and documents is likely to be granted due to the consequences arising from refusing such access. In addition, in the event this should not be enough/sufficient, the Commission may use public force to get the information it needs.

These new powers given to the Commission seem to have strengthened it, in order to make its authority prevail, and most of all, to comply with its function as an entity that is protective not only of competition within markets, but also of consumer welfare. Efforts to draw an efficient legal framework, in this regard, appear to be quite effective, and will probably have a positive outcome, although assuring positive outcomes may be hasty, since the Law has been effective only for a few months.

1.2 Administrative Proceeding

1.2.1 Provisional Remedies

The Amendment granted the Commission several additional powers, including the authority to order during a proceeding, as a provisional remedy, the temporary suspension of acts that could imply a monopolistic practice or a forbidden concentration.

The addition of this provision seems to be a very good decision, since its implementation will prevent irreversible damages to competition arising from conducts deemed to be harmful and under review by the Commission, until a final resolution is issued by such authority.

In this regard, the executive and legislative powers in Mexico were conscious of the damages that the implementation of this kind of measure could cause to the economic

agent under investigation. As a result, they provided what seems to be an appropriate solution, which consists of the imposition of an obligation on investigated parties to secure payment of liability, in order to avoid suspension of the aforementioned acts, until a final resolution is issued. This way, if the Commission resolves against the investigated party, the guarantee offered by the latter will be used to compensate any damages caused.

1.2.2 Oral Hearing

Following the oral tendency that has been recently introduced in the Mexican legal system, and aiming for a transparent deliberation between the economic agent under investigation and the authority in charge of issuing a resolution, the Amendment provides a final stage within the competition proceeding where economic agents accused of breaching the Law may file orally, before the Plenary Session of the Commission, and immediately before the Commission issues a final resolution, any clarifications they deem convenient/relevant. This hearing may only refer to the arguments already made or to evidence already filed.

This may be a very useful resource for investigated parties, since the written tendency followed by Mexican laws up until a few years ago, did not always help the defendants to win credibility, relying only in what may be reflected in a piece of paper. In addition, we must not forget that it is indeed a new opportunity for investigated parties to try to convince the authority of their innocence, so it seems a beneficial provision, at least for defendants. Nevertheless, as mentioned throughout this article, we must not disregard that the investigation and the proceedings, including this final hearing, are all carried out before the same authority, and therefore, it is unlikely for the Commission to change its mind at the very end, after such authority has carried out the entire proceeding.

1.2.3 New specialized courts

Finally, the Amendment provides the creation of Courts specialized in Economic Competition, before which economic agents may file an appeal against resolutions issued by the Commission. In this regard, the Federal Court System has not created the aforementioned courts, nor has it issued the procedural rules applicable to the ordinary administrative trial; nevertheless, they should be issued and created respectively by November, 2011. In this respect, creating specialized courts seems to be a good choice, since a better appreciation of facts may be achieved as a result therefrom.

2. MORE SEVERE PENALTIES

The penalties provided before the Amendment were extremely low in comparison to those imposed by other countries, and, hence, they did not fulfil the purpose of dissuading economic agents from breaching the Law; the fine was a low price to pay, compared to the benefits that could arise from a corresponding breach. In order to address this matter, the Amendment significantly increased the amount of fines, which may now be of up to 10% of the taxable income of the economic agent during the previous year. Fines that are still calculated based upon minimum wages were significantly increased as well; namely, up to 700% thereof.

Increasing the amount of fines appears to be the right decision to dissuade economic agents from carrying out anticompetitive conducts and damaging consumers, since consequences arising therefrom may even bring a company to bankruptcy. The price to pay for committing such kind of practices will no longer be a low price to pay and benefits arising from such practices will probably no longer be as appealing as they were before the Amendment.

Finally, one of the most significant modifications brought by the Amendment is a modification to the Federal Criminal Code, that introduces a three to ten year prison penalty to any individual that carries out an absolute monopolistic practice (i.e. agreements between competitors to fix or increase prices) in addition to a penalization that may fluctuate between 1,000 and 3,000 "fine days" (equivalent to the daily net income received by the condemned party at the moment the felony took place).

From this author's particular point of view, this provision seems to overstep the mark. Penalties arising from a felony should be proportional to the felony itself, and even though damages arising from monopolistic practices may be quite significant, depriving an individual from his freedom seems quite severe, especially considering the poor situation of Mexico's criminal justice system. Nevertheless, it is likely that the Commission would only file a complaint under this provision in exceptional cases, and not as a general rule.

3. CONCLUSION

The Amendment has been in force for only three months, and no sanction has been imposed under the new wording thereof, since infractions and felonies committed prior to the Amendment, have been and will be resolved under the previous wording of the Law. Likewise, investigations, inspection visits and proceedings initiated before the Amendment came into force, are being concluded according to the prior wording of the Law. Regarding this matter, only three investigations have been initiated as of the date the Amendment entered into force, and even though they will be indeed subject to new procedural rules, they will probably be penalized according to the prior wording of the Law, since it is likely for such procedures to refer to conducts that took place before the Amendment came into force.

Consequently, and at least for the moment, there is no way to affirm whether the Amendment has succeeded in effectively addressing the realities of national markets and dissuading economic agents from carrying out anticompetitive conducts. Nor is it possible to ascertain whether the new authorities granted to the Commission have been useful in order for it to enforce its functions in a more efficient way.

Nevertheless, the Amendment implies a praiseworthy effort to have an effective legal framework that complies with the purpose of achieving fair competition and avoiding wrongful privileges and advantages in favour of certain groups. If applied correctly, there is a great possibility that the Amendment dissuades economic agents from carrying out monopolistic practices and forbidden concentrations, and that it will result in benefiting customers with more quality and better prices.

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