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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Mexico

-- Session II --

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Introduction

1. Competition policy in Mexico began in June 1993, when the Federal Law of Economic Competition (FLEC) entered into force and the Federal Competition Commission (FCC) was created as the authority responsible for its enforcement. After ten years of implementation, competition policy has registered substantial achievements in promoting economic development and enhancing consumer welfare. However, it also faces important problems and challenges that need to be addressed in order to allow competition policy to play a central role in promoting economic development in the future. This document presents a brief summary for the main challenges the FCC faces in promoting competition in Mexico.

1. Competition Policy as State Policy

2. One of the most important challenges in promoting competition in Mexico is to convert competition policy into a state policy, such that competition and efficiency principles are included in all relevant economic and regulatory government decisions.

3. Economic regulations and industry specific policies must be designed not as an alternative to competition, but as a complement in promoting market efficiency. However, in Mexico many policy makers still see competition and regulatory policies as rivals. Many regulations and policies are designed not as instruments to promote competition and enhance efficiency, but to achieve certain desired results and to protect the industry from market forces. Many still believe that barriers to entry and subsidies must be used in favour of domestic enterprises to enhance the competitiveness of Mexican firms. This road is clearly against competition and efficiency principles.

4. The FCC would promote competition more effectively if all relevant economic and regulatory decisions by the government were consistent with competition principles. This goal would be achieved if the FCC was empowered to issue binding opinion regarding competition aspects of the legal framework and policies proposed or issued by the government.

2. Culture of Competition

5. Another major obstacle in promoting competition in Mexico is the lack of competition culture. Competition is far from becoming the normal way of organizing national life. Obtaining and keeping privileges granted by the state at the expense of public budget or special provisions in laws and policies is still embedded in the Mexican business culture.

6. Competition increases efficiency and economic welfare, but it also implies the loss of privileges, which creates opposition. This opposition can only be offset if the winners are aware of the benefits brought by competition. Unfortunately, the role of competition in achieving efficiency and promoting economic development is still unknown for many in Mexico. One of the main reasons for this unawareness is that competition is absent in substantial aspects of national life: health care, education, electricity, oil, etc.

7. The FCC has undertaken efforts to promote competition, but better results would definitely be reached if the FCC had more allies in these efforts.

3. Excessive Litigation and lack of Economic Expertise in the Judicial System

8. The effectiveness of enforcing competition law has been injured by excessive litigation. The FCC has dedicated significant effort and resources to defending its resolutions in different instances offered by the Mexican judiciary system. Most of FCC decisions that do not favour economic agents are challenged at the courts, thus delaying resolutions and their implementation.

9. Economic agents unsatisfied with the FCC's decisions have two forms of proceeding to challenge these decisions in the judiciary system: they can file an "*amparo*" in the federal district court against unconstitutional acts by the FCC and an appeal in the Court of Fiscal and Administrative Justice against FCC's resolutions that impose fines. This section addresses the situation of *amparo* proceedings.

10. The number of *amparo* proceedings filed has increased significantly during last few years: 15 in 1997; 33 in 1998; 63 in 1999; 83 in 2000; 124 in 2001; 117 in 2002; and 164 in 2003. By the end of 2003, 273 of these cases were pending resolution by the courts. These figures illustrate the magnitude of the delays that litigation introduces in enforcing competition law. *Amparo* actions have been filed against requirements of information, writs of alleged responsibility, decisions to admit or reject evidence, preliminary orders, fines imposed for failure to comply with discovery orders, and final resolutions.

11. The FCC recognizes that *amparo* actions constitute a crucial instrument to protect the right of individuals. However, the excessive number of actions has become a serious problem for promoting competition, not only because they consume a substantive portion of FCC's resources, but also, and more importantly, because they delay justice and leave the public interest unprotected.

12. There are several problems with the current *amparo* system. First, while cases are litigated, agents committing monopolistic practices continue collecting the benefits of such practices. Therefore, they have incentives to file *amparo* suits and delay final resolutions, even if they know that they will eventually lose the case. Second, often different *amparo* suits are filed against the same FCC case and processed by different judges who, at times, issue contradictory rulings. Third, most court resolutions imply that CFC's procedures must be redone, however when the procedures are redone and the FCC issues a new resolution, the involved parties can file another *amparo* proceeding dealing with the substance of the case.

13. Another important problem in enforcing the competition law in Mexico is associated with the lack of economic expertise in the judicial system. The implementation of competition legislation requires specialised expertise and resources, because it involves the understanding of complicated economic concepts which are unfamiliar to most courts. After ten years of competition policy in Mexico, courts have not yet developed this expertise, and therefore their attention is biased towards procedural issues rather than substantive competition issues.

14. A recent report prepared by the OECD on Mexico's competition policy summarizes this situation as follows:

- "The district courts are unfamiliar with, and probably uncomfortable about, substantive antitrust issues. Further, Mexico employs a civil law system that has traditionally involved detailed legislative enactments, and courts are unused to dealing with a statute as short and non-specific as the LFCE. By ruling adversely on a procedural point, the court can send the case back to the CFC and avoids resolving the antitrust question.

- In a few Commission *amparo* cases, parties challenging the Commission's action have proffered testimony by economic experts. The district courts have no rule barring economic experts, but the applicable rules of procedure in *amparo* cases require that the court retain its own expert if the court determines to admit testimony by a party's expert. This poses yet another problem, because the judiciary's budget for services of this kind is limited, and the pool of capable antitrust economists is quite small. Thus, the expert ultimately retained by the judge may not have expertise suitable for a CFC case. Nonetheless, the procedural rules require that the judge, in deciding the merits of the case, must rely on the expert retained by the court in preference to the expert retained by a party.
- The problems presented by the *amparo* process are difficult to resolve. The passage of time may ultimately produce a decrease in case volume as issues reach the Supreme Court for resolution. In the meantime, the right to judicial review can be constrained only by amending the constitution, and altering the constitutional scheme of checks and balances is rightly disfavoured. There has sometimes been mention of establishing a specialised *amparo* court with economic expertise to hear cases from the CFC and the other agencies that deal with economic issues, but no action to advance such a proposal has been undertaken."¹

15. The actions of the FCC would be more effective if courts, specially in the administrative field, simplified their procedures and developed economic expertise.

4. Ineffectiveness of Fines

16. Another important problem in enforcing competition law is the small proportion of fines that are collected. By the end of 2002, the FCC had imposed an equivalent of \$30 million USD in fines, of this amount, only 9.5 percent were collected, while 18.5 percent were revoked by the courts, and 72 percent were pending for execution because the respective cases were in litigation or in some later stage of the procedure. Such a small proportion of fines collected is due to two main problems.

17. First, there are many opportunities to challenge fines so that their collection is tremendously delayed: the affected individual can first file a review procedure before the FCC, it can then file an appeal proceeding before the Court of Fiscal and Administrative Justice, which also has a review procedure and finally, the party can initiate an *amparo* action.

18. Like the *amparo* proceedings, the number of appellate actions in the Court of Fiscal and Administrative Justice has also increased: only 3 cases were filed during the period 1993-1997, this number increased to 6 in 1998, 9 in 1999, 14 in 2000, 13 in 2001; 43 in 2002, and went back down to 6 in 2003.

19. Second, even if a fine survives all these review proceedings and becomes final, it still needs to be collected. The collections of fines is a responsibility of the treasury of the municipality in which the party resides. If the fine is not paid voluntarily, the municipality has to initiate an administrative proceeding to issue an order of execution against the debtor's assets, and this proceeding is itself subject to *amparo* review.

20. The FCC would better face this challenge if it had the power to collect the fines by itself.

5. Legal limitations

21. The FCC faces some legal limitations to sanction certain anticompetitive practices and undertake more effective investigations. The most important limitations are summarised below:

- The FCC is not empowered to stop or sanction the abuse of market power through excessive pricing or other commercial conditions, which limits FCC's ability to promote efficiency in non regulated sectors with barriers to entry. The FLEC prohibits and sanctions anticompetitive practices that limit free competition. In most markets this is enough to prevent the abuse of market power through excessive pricing or other terms and conditions, because new entrants can offset attempts of incumbents to obtain extraordinary rents. However, there may be markets with significant entry barriers that are not subject to sector specific regulation in which incumbents endowed with substantial market power do not incur in anticompetitive practices against competitors, but can still abuse their market power and extract monopolistic rents by setting excessive commercial or pricing conditions. In Mexico, there have been cases where the FCC has not found any illegal anticompetitive practices, however domestic prices are unjustifiably above international prices because high investment requirements inhibit the entrance of new participants. In these cases, the FCC is not empowered to offset the abuse of market power that injures consumer welfare.
- Although monopolies are illegal *per se*, the FCC is not empowered to impose structural remedies on them, and hence its ability to deter anticompetitive practices is diminished. The FCC is empowered to sanction anticompetitive practices that undermine the competitive process and free entrance. Nevertheless, when there is a serious harm to efficiency and consumer welfare, economic sanctions may not be enough to deter anticompetitive practices. In such cases, for example, extraordinary rents obtained by monopolies through anticompetitive practices would justify the payment of any sanction imposed. Under these situations, competition can only be promoted by imposing structural remedies, like the divestment of the monopoly. Obviously, this power should be only used in exceptional circumstances, to remedy serious harm on consumer welfare or recurrent anticompetitive practices.
- Another important limitation faced by the FCC in promoting competition, is that the FLEC does not give the FCC the power to order suspension of anticompetitive practices pending resolution. The lack of this faculty provides incentives to delay investigations and to challenge FCC resolutions as much as possible, because the agent incurring in anticompetitive practices collects the benefits of these practices as long as a final order to stop such practices is not issued and implemented.
- The FCC is not empowered to undertake on-site investigations. Currently, information obtained by the FCC depends on whatever the enterprise under investigation voluntarily declares, on the statements of other enterprises or individuals involved and any other information provided by other authorities or public sources. The foregoing significantly limits the effectiveness of the Commission to carry out investigations, particularly investigations on its own initiative.
- The FCC is not empowered to carry out leniency programs, which have proved to be a powerful tool to prosecute cartels in other countries. The FCC believes that gathering information against hard core cartels would be greatly enhanced if this type of programs were implemented.

22. Overcoming these legal limitations would significantly enhance the power of the FCC to prevent and sanction anticompetitive practices.

6. Conclusions

23. The main challenges faced by the FCC in promoting competition in Mexico, can be grouped in the following categories: 1) Lack of an integral competition policy; 2) Lack of competition culture; 3) Excessive litigation and lack of economic expertise in the judicial system; 4) Ineffectiveness of fines imposed by the FCC; and 5) Legal limitation to sanction certain anticompetitive practices and to undertake more effective investigations.

NOTE

1. OECD, Competition Law and Policy, Review of Mexico, DAFE/COMP(2004)1