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LATIN AMERICAN COMPETITION FORUM

-- Session I: Competition Principles in Essential Facilities --

Contribution from Mexico

8-9 September 2010, San José (Costa Rica)

The attached document from Mexico is circulated to the Latin American Competition Forum FOR DISCUSSION under session I of its forthcoming meeting to be held in Costa Rica on 8-9 September 2010.

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LATIN AMERICAN COMPETITION FORUM

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Session I: Competition Principles in Essential Facilities

-- CONTRIBUTION FROM MEXICO --

Summary

1. Mexican legislation on regulation and competition does not explicitly touch on the concept of essential input, but does deal with it indirectly by prohibiting practices of displacement and by enshrining the obligation to provide non-discriminatory access to specific sector infrastructure. The country's competition legislation authorizes the Federal Competition Commission (CFC) to punish unilateral action that limits access to inputs required to compete effectively. Legislation in the transportation, telecommunications, energy and retail banking sector mandates non-discriminatory access to specific infrastructure, which in fact coincides with what is considered essential infrastructure. The CFC and sectoral regulators have intervened on multiple occasions to promote competitive access to essential inputs, but coordination among these agencies needs to be improved.

1. Competition legislation on essential inputs

2. The Federal Economic Competition Law (LFCE) does not explicitly refer to essential infrastructure or inputs. However, it authorizes the CFC to investigate and punish relative monopolistic (unilateral) practices that unjustifiably limit access to an input required to compete effectively. Specifically, Article 10 prohibits various established practices that agents with substantial market engage in to displace competitors from the market. These include refusal to deal, price discrimination and raising costs, measures that can be used to limit access to essential inputs.

3. The CFC has the power to determine whether an input is essential as a part of an investigation of unilateral conduct limiting access to the input. If the input in question has no viable substitutes, the relevant market is generally defined as the one providing that input, and the Commission determines to what degree the party responsible for the practice has substantial power in that market. It also assesses the possible displacement consequences of the conduct in the market in question, or in a downstream or upstream market. Finally, when the agent responsible for the behaviour has substantial market power, and displacement is an object or effect of the behaviour, non-discriminatory access to the input is ordered unless the responsible party can justify the existing practice on the basis of gains in efficiency.

4. The experience of the CFC in cases of relative monopolistic practices that include essential inputs principally involves investigations on access to telecommunications networks, audiovisual content, gas transport, airports and ports.

2. The roles of the CFC and sectoral regulators

5. As mentioned above, the CFC can declare facilities essential and order non-discriminatory access through a process of investigation and sanctions for unilateral practices. Sectoral regulators do not have the authority to declare facilities essential, but sectoral laws specify which inputs are subject to obligatory access, and under what conditions.

6. In addition, the LFCE provides for a process of “declaration of substantial power”. This allows the CFC to investigate and, when appropriate, declare an agent to be dominant in a relevant market in order to allow sectoral regulators in different markets to establish regulations governing the terms and conditions of access to essential inputs.

7. In sectors with essential inputs, such as the transportation, telecommunications, energy and retail banking sectors, there is a frequent overlap of jurisdictions between sectoral regulators and the CFC. In these sectors, sectoral regulation generally provides for obligatory access. Thus, when access is refused, an affected agent can appeal to the sectoral regulator. However, it can also lodge a complaint with the CFC, which also has jurisdiction in regulated sectors. As a result, it has occurred that two agencies initiate parallel procedures to address the same problem. This is particularly frequent in the telecommunications sector.

8. There is currently no formal coordination mechanism to prevent conflicts of jurisdiction or overlapping cases. Informal mechanisms for collaboration exist, but in practice they are of very limited scope, consisting of sharing information.

3. Regulation of essential infrastructure in specific sectors

3.1. Telecommunications

9. Under the Federal Telecommunications Law, concessionaires of public telecommunications networks must provide interconnections to competitors under non-discriminatory conditions. The concessionaires can agree between themselves on the terms and conditions of interconnection. In case of disagreement, the sectoral regulator can set conditions and terms in areas where the parties have failed to come to an understanding.

3.2. Railroads

10. Under the Law Regulating Rail Service, concessionaires must provide other concessionaires with the interconnection and terminal services required to provide public rail transport, as well as with drag-

along rights and rights of way. In case of disagreement, the Secretariat of Communications and Transportation (SCT) sets the conditions and payments that are to be associated with the services provided.

3.3. Gas

11. Under the Law Regulating Article 27 of the Constitution in the Petroleum Sector, the transport, storage and distribution of gas is regulated, as are first-hand sales of gas. Access to transport, storage and distribution of gas via pipeline must be non-discriminatory and provided under competitive conditions. The Energy Regulatory Commission has the authority (i) to regulate first-hand sale prices unless, in the judgment of the CFC, conditions of effective competition are present, or the prices in question are set by the federal executive branch, and (ii) to make and issue decisions regarding the terms and conditions under which gas transport, storage and distribution services are to be provided.

3.4. Seaports

12. Under the Law on Ports, port services in public ports and terminals are provided on a non-discriminatory basis under competitive conditions to all requesting users, except where the public interest or reasons of high priority dictate otherwise. In addition, the SCT can regulate rates and prices for the use of facilities and services in the absence of a competitive environment. Regulation can set specific or more general caps on rates and prices, as well as creating adjustment mechanisms and establishing timeframes. Prices and rate regulations are subject to the opinion of the CFC.

3.5. Airports

13. Under the Airports Law, port services and complementary services in civilian airports are provided to all requesting users under non-discriminatory and competitive conditions, pursuant to the criteria of the SCT. In addition, the providers of the services must be entities distinct from the entity that manages the airport. Finally, the SCT can regulate rates and prices when, in the view of the CFC, competitive conditions are not present. The regulations define individual or overall price caps, as well as adjustment mechanisms and timeframes.

3.6. Retail banking

14. The Law for Transparency and Regulation in Financial Services (LTOSF) and associated secondary regulations guarantee non-discriminatory access to the payment infrastructure, financial clearinghouses and payment processing systems. In addition, the Law to Regulate Credit Information Firms requires such firms to serve all clients requesting service, and to furnish their database to any other firm requesting it. The law also provides that in the absence of agreement between the parties, the price of the database is defined bilaterally with intervention from the National Banking and Securities Commission.

4. Authority to separate or restrict vertically integrated monopolies

15. The CFC does not have authority to order the disincorporation of essential facilities, but it can impose vertical restrictions by applying Article 10 of the LFCE, which prohibits refusal to deal, discrimination and behaviour that increases competitors' costs, among other things. In practice, the authority can also wield influence by participating in privatisation procedures, and by setting conditions for the approval of mergers.

16. In various privatisations, the CFC has successfully recommended including vertical restrictions for the privatised enterprises. For example, it limited the simultaneous ownership of ports and shipping companies, as well as airports and airlines. For railroads, it recommended mandating rights of way, drag-along rights and the interconnection rights.

17. The Commission has also imposed vertical restrictions in the form of conditions for the authorisation of mergers. For example, conditions were put on the merger of Televisa, a major producer, distributor and marketer of Spanish-language contents, with TVI and Cablemás, which are regional providers of limited cable TV programming. In 2008, Televisa received 69% of broadcast television advertising revenues and had 45% of the subscribers to limited TV programming. Through the firm SKY, it also had the only satellite service. Therefore, the CFC made the merger conditional on Televisa's (i) offering other operators a package with its broadcast signals under non-discriminatory conditions; (ii) broadcasting on its networks the signals of any broadcast TV outlets that so requested; and (iii) preventing members of its board of directors from taking part in the management and operational entities of other telecommunications network concessionaires. Televisa's signals include Mexico's most popular broadcast signals, which the cable operators considered an indispensable input for competing.

18. Finally, the CFC has imposed restrictions by accepting commitments. For example, it closed down an investigation of refusal to deal against PCTV before it was finished. PCTV is a firm that acquires television signals and packages them to sell to local cable operators. The majority of PCTV shareholders are those very clients that operate cable systems. The only exceptions are a group of "independent" operators. Some of the latter made complaint regarding PCTV's refusal to provide them signals that were regularly available to PCTV's partners. The CFC determined that without those signals, the cable operators could not offer users competitive packages.

5. Conflicts regarding declarations of essential infrastructure

19. Since the LFCE does not explicitly mention infrastructure or essential inputs, conflicts on the correct determination of essential infrastructure have not occurred in these terms. Rather, attention has centred on definitions of relevant market, substantial power, and anticompetitive object or effect.

20. The telecommunications regulator is currently in the midst of a legal conflict with the Telmex group, the largest operator of fixed and mobile telephone networks, after the regulator approved a Fundamental Technical Plan for Interconnection and Interoperability. Under the plan, the largest public telecommunications network in the area of the concession must interconnect with the smallest or entering networks in the area, and provide transmission under non-discriminatory price and quality conditions. The smaller networks are not obliged to interconnect with all the other networks, but can use Telmex's facilities. In conclusion, it may be said that the regulator implicitly considers the largest network to be an essential input for the survival or entry of small operators. Telmex's challenge to these provisions is currently in the courts.

6. Investigations that involve downstream clients/competitors

21. The Commission has investigated and imposed sanctions on owners of essential facilities or inputs for various forms of refusing access. For example, it investigated the Telmex group on a number of occasions for (a) refusing access to its long-distance network; (b) refusing access to its local telephony network's digital trunk lines; (c) refusing interconnection; (d) offering intercity service under non-competitive conditions; and (e) charging its end users a termination fee for calls on its largest mobile network.

22. In a 2002 case, the CFC imposed sanctions on Telmex for charging excessive rates for intercity services, for limiting access or downgrading the quality of access to various elements, and for price discrimination (between end users and operators). The Commission found that Telmex was a dominant operator in the intercity and access markets, because it had a large share of each market, the ability to set prices and the ability to unilaterally restrict the supply of elements not covered by the sector's regulations. The Commission also determined that the Telmex network was an input necessary for intercity

transmission, since competitors faced a high economic and financial cost for replicating the infrastructure, and such replication was inefficient. At that time, the Telmex network was the principal input that long-distance operators needed to gain access to Telmex's end users, who represented over 90% of all fixed telephone users. Finally, the investigation concluded that the object or effect of Telmex's behaviour was to displace long-distance operators.

23. In 2009, the CFC fined Televisa 47 million pesos (US\$ 3.7 million) for refusing its broadcast signals to a regional cable operator with which it competed through SKY (a Televisa subsidiary). The Commission concluded that Televisa's broadcast signals were an input essential for offering competitive packages, since they are the most popular in Mexico, since are not easily replaced by other signals and since the cost of producing content for Mexican television is high.

Final comments

24. Although Mexican legislation does not explicitly include the concept of essential input or infrastructure, this type of input is subject to a range of regulatory controls. On one hand, the LFCE prohibits practices that restrict access to the inputs necessary to compete. On the other, various sectoral regulations mandate obligatory access to specific infrastructure that is the same as that normally deemed essential.

25. The Commission can also promote competitive access to essential inputs through the merger approval process, by issuing recommendations on privatisations and bidding for public assets, and by declaring that dominant players are present in regulated sectors.

26. The CFC and sectoral regulators have accumulated a great deal of experience regarding practices that limit competitive access to essential inputs. However, mechanisms for cooperation and coordination need to be improved to reduce inefficient overlaps between agencies, and to improve implementation of the principles of competition.