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Judicial Perspectives on Competition Law

– Mexico* –

1. Introduction

1. Judges play a critical role in ensuring that competition enforcement is executed according to sound legal precedent and economic principles. The main challenges for competition agencies regarding their relationship with the Judiciary include judges' familiarity with competition law concepts, interpretation of competition rules and appropriateness of standards of proof.
2. To address these concerns and enhance the competition regime, in 2013, the Mexican Constitution was reformed, establishing new competition specialized courts with the objective of better understanding and enforcement of Federal Economic Competition Law (herein after FECL or competition law).
3. The Mexican Federal Economic Competition Commission (COFECE) has since recognized the essential role the new specialized courts play in the creation of a specialized legal system that generates certainty. Therefore, COFECE works towards a stronger relationship with the Judiciary, ensuring a fluent communication and two-way dialogue with the Courts and Tribunals, maintaining an appropriate distance to guarantee impartiality and independence of their decisions.
4. This close collaboration takes many forms, including participating in capacity-building workshops, academic programs and conferences organized by the Federal Judiciary Council which aim at strengthening Judges knowledge of competition policy goals and technical analysis tools.

2. Creation of Specialized Courts

5. The Constitutional reform in telecommunications, broadcasting and economic competition of June 2013 modified Mexico's competition policy landscape.
6. A key aspect of the reform was the mandate to create specialized courts to review competition matters.
7. Prior to the reform, parties may appeal the competition authority's decisions before two different instances, i) a Federal District Court, to challenge its legality or constitutionality, and ii) the Federal Tax and Administrative Court, to challenge the imposition of a monetary payment obligation. The unfamiliarity with economic matters kept almost all courts and tribunals away from resolutions on competition issues. The judicial review heavily focused in the discussion of procedural grounds and, to a lesser extent, to address the substantial aspects of the cases. The courts were more focused on the procedural issues of the claimed acts.

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8. On August 10, 2013, the Federal Judiciary Council (FJC), the body responsible at the federal level for administering, monitoring and disciplining Circuit and District Courts in Mexico, created the new District Courts and Collegiate Circuit Tribunals for administrative matters, specialized in competition, broadcasting and telecommunications,¹ based in Mexico City, with national jurisdiction. In compliance with the 2013 amendments, the FJC was also responsible for establishing a mechanism for case allocation, for the rotation of specialized Judges and Magistrates and the appropriate measures to guarantee the independence, objectivity and impartiality of the competition Courts and Tribunals.

9. Specialized Courts are integrated by two Judges and six Magistrates, and their technical staff. Tribunals were integrated by 3 Magistrates. Judges and Magistrates were selected on merit by the FCJ and through an internal contest process. One of the selection criteria was experience, of at least 10 years in an Administrative Judicial Court for Judges, and 15 years' experience for Magistrates.

10. The transition was supported through the Federal Judiciary Institute (FJI), an auxiliary body of the FCJ in charge of training and capacity building of the members of the Judiciary, mandated to provide initial training, through specialized courses, to Judges and Magistrates, and their staff, in competition and telecommunication matters.

11. The new specialized courts are more open to economic reasoning and empirical evidence.

3. Judicial Review

12. The ultimate instance for revising and deciding on competition cases in Mexico is the Judiciary – the Supreme Court and the specialized Collegiate Circuit Tribunals.

13. With the 2013 reform, the reconsideration recourse (an administrative appeal before the competition authority) was eliminated, streamlining competition enforcement procedures and allowing the COFECE to be more efficient and refocus its resources.

14. Before the amendment, the parties could appeal the Commission's acts or decisions of the through administrative resources, and "*amparos*". These were used against acts or resolutions, not only on final decisions, but preliminary and intermediate actions, thus parties or economic agents were able to appeal the different authority's acts, in many cases slowing down the authority's procedures. At that time, it was a common practice of lawyers to ask for an interim-suspension of the authority's decision while the "*amparos*" were resolved.²

15. Currently, economic agents still have a constitutional resource to appeal against COFECE's decisions, but they must wait until the end of the procedure to appeal. This means that the specific bodies within the Judiciary entitled to review competition cases may proceed, only when COFECE has issued its final resolution, after the investigation stage and the trial-type procedures have ended.

¹ As set forth in the General Agreement 22/2013 of the Federal Judicial Council, published on 9 August 2013, in the Federal Official Gazette. Available in Spanish at: http://dof.gob.mx/nota_detalle.php?codigo=5309912&fecha=09/08/2013

² Since the 2013 Reform, as it is set forth in Article 28 section VII, sanctions and divestiture of assets are not executed until the "*amparo*" lawsuit is settled.

16. District Courts are the first review instance within the Judiciary for COFECE'S resolutions. These courts will qualify both, the legality and constitutionality, of the resolution issued. The courts may also pronounce on the constitutionality of norms that support the contested decision. The decision of this judicial body may protect or may not protect an individual, or dismiss the matter. The resolution issued by this body may be reviewed by a Circuit Collegiate Tribunal. These tribunals are hierarchically superior to district courts. It is optional for individuals to resort to this instance.

17. If there are questions of constitutionality and legality regarding the grounds that support COFECE's resolution, the circuit courts will submit the case to the Supreme Court for its revision. The Supreme Court will decide on the constitutionality and legality, and return the matter to the circuit court for revision of pending issues related to the Federal Economic Competition Law enforcement.

Figure 1. Mexico: specialized courts on competition matters



4. Engaging with the Judiciary

18. In 2016, the Judiciary confirmed 77% of COFECE'S decisions. In 34 cases, the Judiciary denied the “*amparo*”: in 25 of these cases, it was established that the Commission's decisions observed the constitutional rights of the appellant. The rest of the trials were dismissed.

19. This outcome is the result of the Commission continuous work on three fronts: first, presenting vigorous and robust cases, effectively communicating COFECE'S decisions; second, working on the soundness of its arguments and better compliance with procedural rules; and third, participating in capacity building with the Judiciary power.

4.1. Relevant Cases

4.1.1. Use of Economic Evidence

20. Obtaining direct evidence of collusive agreements is a complicated task, as the participants in a cartel are usually aware of the illegality of their actions and, therefore, try to hide any evidence that may incriminate them. To address this issue, indirect evidence is used to prove the existence of the anticompetitive practices.

21. In Mexico, the Supreme Court consolidated the use of indirect economic evidence in competition investigations. Not only as an element to sustain the probable responsibility of committing an anticompetitive conduct, but as factor that concatenated can be enough to impose a sanction. The Supreme Court held that economic evidence may be sufficient in the absence of direct evidence, when it is reasonable and linked in a way that presupposes the materialization of the monopolistic practice.

22. In the *ex officio* investigation for the possible collusion between pharmaceutical companies to establish, arrange and coordinate positions in public bids convened by the Mexican Social Security Institute (*IMSS*)³ initiated by the former Mexican competition authority (CFC), the highest court in Mexico not only recognized the importance and consolidated the use of indirect economic evidence, but also established principles to guide its use and assessment.

23. In this case, the CFC used economic analysis of tenders for the purchase of human insulin, electrolyte and intravenous solutions, carried out between 2003 and 2006, to demonstrate patterns and detect bid rigging.⁴ In 2010, the CFC determined that the pharmaceuticals involved were responsible for bid rigging and fined them 151.7 million pesos.

24. On April 2015, the Supreme Court confirmed the legality of the 2010 resolution issued by the CFC against the pharmaceuticals for committing absolute monopolistic practices.⁵ The Supreme Court recognized the complexity of the task to find direct evidence and the importance of indirect evidence; and validated the use of indirect economic evidence to detect cartel activity.⁶ Again, this is a very important precedent for the future of competition enforcement in Mexico.

4.1.2. Judicial Criteria Establishing the Liability of Individuals Acting on Behalf of Companies

25. In December 2009, the CFC initiated parallel investigations for price fixing in the market for production, distribution and commercialization of poultry.⁷ In 2013, COFECE decided to sanction the companies involved, the individuals for their direct participation in the conduct and the industry association for participating as adjuvant in the practices. The sanctioned economic agents filed before the Judiciary separate “*amparos*” against the COFECE’S resolution.

³ File IO-003-2006

⁴ For example, the analysis found that winning positions were always the same, only changing the name of the winning company; the assigned contracts were concentrated in the colluded laboratories and, in some cases, their participation was practically the same; the annual averages of the positions from 2003 to 2006 were almost the same and these changed only before the entry of a new competitor or before the consolidation of the bids; the winning positions fulfilled a pattern in which the winning position was equal among the competitors; and the same happened in the losing positions. The winning positions only varied 1.5%, taking advantage of multiple allocations. The laboratories presented high profit margins that allowed them to offer more competitive positions; however, they did not do it despite knowing the previous positions of their competitors. The patterns of positions and the results of the bids did not reflect an attempt to compete, on the contrary, the reasonable explanation is the existence of a collusive agreement to obtain greater profits than those that would have been obtained by acting independently and competitively.

⁵ Supreme Court Ruling, File 624/2012. Available in Spanish at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=144589>.

⁶ Supreme Court Ruling, File 453/2012. Available in Spanish at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=141207>.

⁷ In May 2011 the former competition authority, the CFC initiated parallel investigations to analyze the effects of this practice in different states of Mexico: Quintana Roo, Veracruz and Mexico City. Files IO-005-2009-I, IO-005-2009-II, RA-028-2013, and RA-030-2013.

26. In 2016, following the rulings of the different specialized Circuit Courts which reviewed the “*amparos*”, the Specialized Plenum of the Circuit Court issued relevant judicial criteria when ruled that to state the liability of a natural person when engaging in absolute monopolistic practices (cartel activity), it is not necessary to prove the formal and legal representation between and individual and a legal entity for which the individual acted on behalf.

27. This was decided by the Plenum given the disparity in the criteria used by the Specialized Collegiate Circuit Courts. The Second Court granted an “*amparo*” to the Sales Director and Sales Manager of a large poultry company, when it considered that the formal or legal representation could not be proven by the working relationship or the legal representation of both employees with the company. On the other hand, the First Court denied an “*amparo*” to the Sales Manager of a competitor of the mentioned company, when it considered that the formal employment relationship between the Sales Manager (the individual) and the legal entity need not to be proven as it was sufficient to prove that he acted as operator of the company and committed anticompetitive conducts.

28. The Specialized Plenum of the Circuit, comprised by six specialized Magistrates, decided unanimously that the criteria that should prevail, as case-law, is that the liability of a natural person arises out of the company actions, when the individual acts as an operator or representative of a legal entity that engages in absolute monopolistic practices (cartel).

29. The criteria for the resolution of this contradiction states that the competition authority does not need to prove the formal and legal representation of the individual to impose a sanction, it is paramount to the way COFECE will defend its resolutions in the future.

4.1.3. Judicial Criteria for Competition Enforcement in Strategic Sectors

30. In August 2013, the former competition authority fined *Petróleos Mexicanos* (*Pemex*), the oil state-owned company, 653.2 million pesos for conditioning the sale of gasoline and diesel to the contracting of fuel transportation services from *Pemex*, and ordered the elimination of the conduct.

31. In January 2017, the Second Chamber of the Supreme Court, granted an “*amparo*” to *Pemex* and *Pemex Refinación*, overruling the 2013 decision.⁸ The Supreme Court ruled that the transportation of fuels to service stations was a strategic area reserved to the Nation, in accordance with the legal framework in force prior to the 2013 energy reform, and therefore it was decided to render the sanctions imposed as invalid. The Supreme Court's decision was taken based on today's abrogated Law Regulating Article 27 of the Constitution in the Oil sector and its Regulations.

⁸ Supreme Court Ruling, File 415/2015. Available in Spanish at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=179360>.

4.2. Capacity Building

32. As mentioned above, COFECE has a strong interest and motivation to strengthen communication with the Mexican Judiciary, maintaining an appropriate distance to ensure impartiality and independence of the courts' decisions. For this reason, it participates in capacity-building programs on competition matters for Magistrates, Judges, and their staff.

33. The goal is not to explain to Judges and Magistrates how they should rule on competition cases, but rather establish a common language and common ground that facilitates an understanding of the complex economic factors in competition cases.

5. Conclusions

34. With the creation of specialized courts, the Judiciary becomes an even more crucial element in the implementation of economic competition policy t, since its decisions constitute to a considerable extent, future precedents in this matter.

35. As of today, the specialization of the country's courts has allowed a more nuanced review of competition decisions.