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A COMPARATIVE REVIEW OF REGULATION OF ECONOMIC COMPETITION IN MEXICO AND THE UNITED STATES

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INTRODUCTORY REMARKS

It would be difficult to find a better time to engage in a comparative analysis of the antitrust legal regimes of the United States and Mexico. Very interesting things are happening in both countries that will certainly affect our legal discipline. The U.S. is experiencing an impressive development of information technology, which challenges the "conventional" ways of doing business and Americans have recently selected a new President. In Mexico, free trade is "in," and last year we witnessed the inaugural speech of a democratically elected President for the first time in many decades.

Comparative analysis of law is always tricky, but especially in this area of law because Mexican legislators borrowed many ideas from various different countries, including the United States. On the surface, the basic concepts used in both antitrust legal regimes are quite similar. The American *per se* rule and rule of reason seem to correspond almost perfectly to the "absolute" and "relative" monopolistic practices of the Mexican law respectively. The anti-merger provisions contained in Section 7 of the Clayton Act¹ and in the Hart-Scott-Rodino Act² resemble substantially those contained in the Mexican Federal Law of Economic Competition.³ Furthermore, "Relevant Market," "Market Power," "Substitute Products," "Barrier to Entry," "Efficiencies," and many other concepts are shared by both regimes, as one might have guessed, considering the fact that all these concepts are imported to the legal world from economics. But as soon as one scratches the surface, one discovers important differences underlying the supposed identity of both antitrust regimes.

One important difference concerns the application of the *per se* rule. It is true that the conduct that constitutes an absolute monopolistic practice under Mexican law may be equivalent to some of the conduct to which the *per se* rule has been applied in the United States. However, one should not forget that in the US, the *per se* rule is a methodological approach used to define the illegality of a conduct. By contrast, in Mexico, the *per se* rule is a closed catalogue of conducts already defined by the legislator (in Article 9 of the Federal Law of Economical Competition). Moreover, there is no possibility for the Federal Competition Commission or for a federal judge to use a "rule of reason" approach when reviewing any of those conducts, even if that were the best thing to do in view of the circumstances. Therefore, under Mexican law there is no space for precedents similar to *Standard*

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1. Clayton Act, 12 U.S.C. §7 (1923).

2. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a (1976).

3. Federal Law of Economic Competition (*Ley Federal de Competencia Económica*), D.O., December 24, 1992.

*Oil (N.J.)*⁴ or *BMI*.⁵ Horizontal price fixing is always illegal, under all circumstances, no matter whether efficiencies in the case at hand would outweigh anti-competitive effects.

Another thing to keep in mind is the trite, but always relevant, fact that both antitrust regimes are framed in very different legal systems and traditions.⁶ The common law system, with its precedent doctrine and ample space for the judge to give content to ambiguous concepts, is very different, both in theory and in practice, from the civil law system, where the judge is supposed to apply the law, not to create it. In the latter system, it is the legislative branch that is the main source of the law; in the former, that role is shared between the judicial and the legislative.

Precisely this line of argument provides a basis for some of the constitutional challenges raised against the Federal Law of Economic Competition by the Mexican forum, as Mr. Guerrero will point out in his presentation. He will discuss recent resolutions of the Mexican Supreme Court relating to the constitutionality of the Federal Law of Economic Competition, including the issue of whether a law that uses concepts such as "relevant market", "substitute products" and the like, and that gives little or no parameters for their application to cases at hand, is contrary to our bill of rights since it grants the Federal Competition Commission the power to legislate while defining these concepts.⁷

Other important differences arise from the institutional and procedural aspects of both regimes. While the US has two agencies in charge of implementing this area of law (the Federal Trade Commission and the Department of Justice), Mexico has only the Federal Competition Commission (except for some conducts that are a felony under the Criminal Code, which are prosecuted by the General Attorney Office). Furthermore, in the United States, antitrust procedures are structured in a triangular way, meaning that the FTC or the Department of Justice and the defendant stand on a level playing field before a Federal judge, at least in the appeal stage.⁸ By contrast in Mexico, such procedures are carried out solely against and before the FCC, which at the same time investigates the alleged violations of the law, judges the merits of the defendant's arguments and, as outrageous as it might sound, also functions as the appeal court. In Mexico, a court of justice will know about an antitrust case only where constitutional issues are at hand (including violations of the exact application of legal rules and the proper founding and motivating rule).

While part of the Mexican forum (mainly the defendants, as you can imagine) believes that this way of structuring antitrust procedures poses serious doubts about impartiality, another part thinks that it is in line with Mexican administrative law

4. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

5. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (BMI)*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.E.2d 1 (1979).

6. See Robert Pitofsky. "EU and US Approaches to International Mergers. Views From the US Federal Trade Commission." EC Merger Control 10th Anniversary Conference, 14-15 September, 2000. Brussels, Belgium. This factor has been addressed recently by Mr. Pitofsky: "Many observers (myself included) believed 10 years ago that procedural convergence would be easier to achieve than substantive coordination. It has not turned out that way. Procedures in merger cases reflect the nature of judicial and administrative structures in each jurisdiction. As these structures differ, therefore, so do the procedures."

7. See *Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XII, August 2000, Pleno and Salas*, page 107.

8. See Federal Trade Commission. "A brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority" (Revised April, 1998).

principles and traditions and that it is the only way to have a realistic antitrust policy.

Because of the Commission simultaneously prosecutes and adjudicates a matter, I believe it is impossible for the Commission to be impartial. How many times will a prosecutor find that he or she was wrong in prosecuting a suspect? The psychological profile of a prosecutor is completely different from the profile of a judge. A prosecutor has the duty of enforcing the law and making sure that any violator is punished. Her success is measured by the number of cases she resolves and that end in a "conviction" (declaration of illegality of the practice or merger, in our context). A prosecutor that, in earnest, is happy because justice was made in spite of her losing the case, is, at the very least, a very rare phenomenon, inadequate to establish a standard of conduct. Antitrust agencies are subject to an enormous pressure to obtain results, to show us how beneficial they are, and how well our taxes are spent in support of their activities. Therefore, I believe they cannot be impartial and no one, except the Mexican legislator, would expect them to be.

Mexican antitrust procedures raise other interesting issues, including those that will be discussed by Mr. Valdés-Abascal in his presentation: When should a third party have legal standing in a procedure before the FCC? Should a third party have legal standing in notification procedures of concentrations when it might be affected by them or only in concentration procedures that begun with a denounce? Mr. Valdés-Abascal will discuss some of these topics in the context of a very recent and essentially Mexican case: the Tequila Case.

While the Sherman Act⁹ has already commemorated its first century of life, the Federal Law of Economic Competition is merely a toddler, having been issued at the end of 1992, and entered into force in mid 1993. This means that American antitrust law has received much more feed back from reality than Mexican antitrust law, and that American judges are used to dealing with these cases, while the Mexican judges are not. Fortunately, youth is an illness that cures itself day by day, inexorably. Both Mr. Valdés-Abascal and Mr. Elizondo will show us how the FCC has had to react to new situations and to innovate in order to provide solutions for problems not solved in the Federal Law of Economic Competition itself. These innovations might be questionable to some civil law attorneys because of how much they may resemble legislating on case by case basis.

The socio-economic realities of both countries is also something to consider in any comparative analysis of antitrust law. For instance, Mexico still has important economic activities that are controlled directly by the state, such as the petroleum industry. In the US, the areas controlled directly and exclusively by the government are few (e.g. national defense). This poses very interesting issues to antitrust law and policy: What is the limit of a state monopoly? When does the state monopoly unduly cross its boundaries and affect other economic activities? That is part of what Mr. Elizondo will present in his lecture.

But Mr. Elizondo will also analyze another kind of boundaries: the territorial ones. For antitrust to be effective, it needs to encompass conducts carried out abroad but with effects in the regulator's territory. This heading for jurisdiction is

9. Sherman Antitrust Act, 15 U.S.C. §1 (1893).

known in Public International Law as “objective territoriality”,¹⁰ although some consider this to be a new doctrine (the effects doctrine).

The problems regarding jurisdiction exist for any of these reasons:

1. An act or offense may occur in more than one state. The typical example is the killer that shoots a gun in Belgium and kills someone who was in The Netherlands. But there are many other examples, such as the case where a felony is planned in one country, but performed in another.

2. Though the offence may occur only in one country, it is very difficult to define in which country. Imagine the use of privileged information (inside information), where Mr. “A”, a German resident in California, buys stock in Tokyo by phone, while visiting London, using his American AT&T card.

3. An act may be an offence in one state, but not in another: this is typical in regard to religious or political crimes, but it was also the case with many conducts related to antitrust law before the Federal Law of Economic Competition was passed by Mexican Congress.¹¹ But even now, such a disparity is possible. If a case similar to *BMI* were heard before the Federal Competition Commission, this agency would have no alternative but to assert an offence (an absolute monopolistic practice) by the defendant whereas in the US, due to the rule of reason approach, such conduct was considered legal. Consider also the comity doctrine. In accordance with *Hartford Fire Insurance*,¹² a contradiction between both legal regimes, in the sense that one orders what the other prohibits (mere legality in one jurisdiction and illegality in the other is not enough) is necessary, among other things, in order to apply this approach. In *Filetech S.A. v. France Telecom S.A.*,¹³ Judge Haight applied the comity approach to dismiss the complaint at bar. He found, among other things, that a conduct with few effects in the US (refusal of France Telecom to give Filetech the “orange list”) might have been not only legal, but mandatory in France, while possibly illegal in the US.

4. Two or more states may have concurrent jurisdiction over the same act. This flows logically from the existence of different headings to assess jurisdiction. If a state uses one heading and another state uses another heading, it is very probable that there will be a concurrence in jurisdiction. But this can also happen when states use the same heading because, with the exception of subjective territoriality, the other principles used to assert jurisdiction are potentially concurrent.

Extraterritoriality is a real challenge to antitrust, especially in mergers analysis. Who will judge if a fact has effect in other state? How significant must the effect be? What if the authorities of the country where the major effects are taking place authorizes the deal, but another country, where effects are marginal, does not? Cooperation between the enforcing agencies around the world seems to be the best way to resolve these issues.¹⁴ That process has already completed 10 years between

10. See Bethlehem, Daniel, Lecture dictated on February 22, 1994, at the LSE, personal notes of Mr. Santiago González-Luna. Territorial jurisdiction can be subjective, according to which the state where the act began has jurisdiction; or objective, according to which the state where the act is completed has jurisdiction.

11. This brings us to retroactivity, which is another topic that will be dealt with by Mr. Elizondo.

12. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

13. *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998).

14. See Bethlehem, Daniel, at the above mentioned lecture.

the US and Europe,¹⁵ but is brand new between Mexico and the US. The Cooperation Agreement between both governments is dated July 11, 2000.

Under this Cooperation Agreement both parties shall: (a) notify each other of any enforcement of the law that might affect the interests of the other party; (b) cooperate and work together to make sure that their respective antitrust laws are enforced, focusing mainly on the exchange of information; (c) begin investigations at the other party's request; (d) take care of the effects of one party's resolutions in the territory and interests of the other party; (e) give each other technical assistance; and (f) observe strict confidentiality.

Returning to the socio-economic issues, technology is of paramount importance. And in this area, the US is one of the unquestionable leaders. A very interesting article published recently in *The Economist* states:¹⁶

Economies are increasingly based on knowledge. Finding better ways of doing things has always been the main source of long-term growth. What is new is that a growing chunk of production in the modern economy is in the form of intangibles, based on the exploitation of ideas, rather than material things. In 1900 only one-third of American workers were employed in the services sector; now more than three quarters are. Knowledge seems to defy the basic economic law of scarcity. If a physical object is sold, the seller ceases to own it. But when an idea is sold, the seller still possesses it and can sell it over and over again. . . Yet the market system as described by Adam Smith 200 years ago was based on the notion of scarcity, including a cost structure in which it is more expensive to produce two of anything than one.

Traditional economic theory assumes that most industries run into "diminishing returns" at some point because unit costs start to rise, so no one firm can corner the market. But an increasing number of information products . . . such as software . . . have "increasing returns". Information is expensive to create but cheap to reproduce. High fixed costs and negligible variable costs give these industries vast potential economies of scale. . .

In such circumstances, the natural market structure therefore becomes a monopoly. An added complication with information goods is that economies of scale may apply not just on the supply side but on the demand side as well, thanks to network effects . . . The value of many information goods, such as fax machines or software packages, increases as more people use them. . .

A third factor can then strengthen a leader's grip on the market: the lock in effect. Once a customer has learned how to use a computer program, say, he is loath to switch because of the hassle of learning a new program. . . so a newcomer has to show a huge advantage to persuade consumers to switch.

This suggests that the antitrust authorities will be kept busy. . .

So the information revolution is also affecting antitrust. Both by increasing the burden of the antitrust authorities due to proclivity of these new intangible goods to monopoly and by challenging conventional economic wisdom as the quoted article states:

15. See Pitofsky, Robert. "EU and US Approaches to International Mergers. Views From the US Federal Trade Commission." EC Merger Control 10th Anniversary Conference, 14-15 September, 2000. Brussels, Belgium.

16. See *Knowledge is Power*, *The Economist*, September 9, 2000, 23.

[S]ome commentators suggest that that the old competition rules are no longer appropriate for the information economy. In particular, they argue that the government should go easy on high tech companies. With rapid technological change and vigorous competition, the say, current market share means little; monopolies will prove only temporary. Furthermore, breaking a monopoly could actually hurt consumers. A traditional monopoly maximizes profits by restricting supply and raising the price. But in information goods, a firm facing demand and supply side economies of scale will do the exact opposite: it will increase output and reduce the price. . .

The Microsoft case and other information technology related cases are pioneers in this area. Information technology is all-pervasive. Nearly all of us regularly make use of laptops, palms and cell phones. So we have a lot to learn from American experiences in this area. How much should the FTC or the Department of Justice mess with information technology entrepreneurs? How to protect competition without suppressing incentives to innovate? The same is applicable to other areas of economic activity that are based on knowledge: medicine, biology, telecommunications, etc. So we are eager to understand how American antitrust agencies and laws are solving these issues.