3-1-1996

Antitrust Enforcement in Mexico 1993-1995 and Its Prospects

Gabriel Castaneda Gallardo

Follow this and additional works at: https://digitalrepository.unm.edu/usmexlj

Part of the International Law Commons, International Trade Law Commons, and the Jurisprudence Commons

Recommended Citation
Available at: https://digitalrepository.unm.edu/usmexlj/vol4/iss1/5

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in United States - Mexico Law Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.
I. INTRODUCTION

Mexico has had new and modern legislation on competition since June 1992: The Ley Federal de Competencia Económica (the Federal Law on Economic Competition, LFCE),¹ regarded by several specialized fora as comparable to and even more liberal in some respects than its counterparts of the United States and Canada.² Mexico has also formed a governmental agency entrusted with its enforcement, the Comisión Federal de Competencia (Federal Competition Commission, CFC).³ This paper reviews the origins of both, after their second anniversary, and comments on relevant aspects thereon, to offer a point of view on future developments. Before starting, it is necessary to state a caveat: the author is a true believer in antitrust law and policy. There is perhaps no better instrument to correct and remedy the imperfections generated in a market economy; there is probably no equivalent as an aid to prevent abuse of market power, whether coming from the private or the public sector; there is probably no more efficient guarantee of open markets. Competition law and active policy support contribute to the “democratization” of market entry by encouraging rivalry, which in turn brings lower prices, better product quality, and diversity of consumer choice. But, of course, competition and its set of analytical concepts and rules, when properly enforced, may conflict with powerful interests. It is only natural that such interests react through subtle or open mechanisms to exert pressure over regulators and the decision-making process to keep their privileges intact. Considering such pressure in the context of Mexican business and politics, it is fair to say that the early enforcement of the LFCE has suffered obstacles and opposition in a fast-track manner, when compared, for example, to enforcement of the Sherman Act in the United States, which confronted serious attacks from large firms, regulators, lawmakers and lobbyists. This is particularly relevant if we analyze the history of

³. LFCE art. 23. The President of the CFC is required to publish, at least annually, a report of Commission resolutions. LFCE art. 28 (III). See discussion in Comisión Federal de Competencia, Informe Anual 93-94 (1994) [hereinafter 94 ANNUAL REPORT]. The Commission’s ANNUAL REPORT is the official organ for disseminating Commission decisions and policies. Reglamento Interior de la Comisión Federal de Competencia art. 22 (IX), D.O. (Oct. 12, 1993) [hereinafter Reglamento Interior]. See also Reglamento Interior art. 3.
the Sherman Act from 1890 until the issuance of the Federal Trade Commission Act and the Clayton Antitrust Act in 1914.\textsuperscript{4} However, the more violent the attacks, the more supporters of the LFCE will be required to create defenses. There may be delay in development of such defenses or effective enforcement, but I believe that competition policy will overcome these formidable obstacles, some of them transitional, such as the current economic crisis with which Mexico now struggles, and others of a more structural nature, such as the influence of regulatory capture.

It is far from clear that competition policy should be kept dormant in order to ease the current economic crisis, as some voices may advocate.\textsuperscript{5} There appears to be no evidence that the formal antitrust “black out” helped pull the United States out of the Great Depression which commenced in 1929. Although there is no empirical evidence at hand, a concentrated economy such as the Mexican cannot benefit from a formal (or informal) antitrust enforcement “black out.” On the contrary, a reversal in antitrust enforcement will probably have the effect of entrenching both state controlled industries and private sector anticompetitive activities. This in turn will foster higher concentration ratios and collusive arrangements, thus generating an efficiency reduction which will take longer to cure. Therefore, the current crisis, paradoxically, may be a good reason not to shut off competition policy. In order to emerge from the crisis in a stronger position, Mexico needs plain, leveled market fields. Competition policy should help the government avoid being held hostage to mighty interests and should stimulate a solid private enterprise environment offering more opportunities to more economic agents.

Far more harmful to competition law and policy is to support a selective enforcement policy. It may be better to have no competition enforcement at all, than to have a policy that discriminates according to the size or the direction of special interests, because then competition policy becomes a Mr. Hyde, distorting markets and creating havoc among the business community, along with imposing damaging transaction costs on the economy.

Mexico is now preparing for an indispensable major national campaign for law and order. Competition law and policy must indeed be a part of it, since it goes to the heart of the economic component of the campaign: to create clear and permanent incentives to market entry. With no clear and enforceable rules there will be no incentives. Mexico’s much needed campaign for law and order will have to fight against an ancient tradition: trying to address real problems with formal instruments; in other words, issuing more regulations, rather than enforcing existing ones. The underlying argument of this paper is that enforcement of the LFCE


\textsuperscript{5} The National Industrial Recovery Act in the United States appears to have induced a policy discouraging enforcement of competition laws in the economic crises at that time. The United States Supreme Court declared the Act unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)
must be a major issue in the law and order campaign. The new administration's National Development Plan 1995-2000 (Plan Nacional de Desarrollo 1995-2000) has a clear commitment to do so. Perhaps there will be no better chance to honor this pledge.

II. THE ORIGINS

Very few countries have experienced a similar set of changes in so short a time frame as the one Mexico went through between 1985 and 1992: exposure to a fully globalized economy; execution of a profound privatization program and implementation of an unprecedented deregulation process. Such changes, along with major progress in the negotiation of the North American Free Trade Agreement (NAFTA) were then the best reasons to speed up the completion of a major project undertaken by a small group within the Economic Deregulation Unit at the Secretaría de Comercio y Fomento Industrial (SECOFI) since 1990: a proposal to issue the first effective competition law in Mexico.

After reviewing other countries' legislation and policies, as well as relevant legal and economic literature and precedents, and consulting with experts from the United States, Canada and the Organization for Economic Competition and Development (OECD), there emerged a draft of what was to be the LFCE, containing: a) the general or basic principles of a substantive and new system to prevent and punish "monopolistic practices"; b) a basic administrative procedure; and c) the legal design and powers for an agency entrusted with its enforcement. This draft was then subjected to legislative approval through Congress and, with few amendments, became law in December of 1992, to enter into force six months later.

The new law and its enforcement were meant to follow four basic principles:

a) promote economic efficiency and protection of the competition process, rather than protection of specific competitors;

b) maximize (indirectly) consumer welfare;

c) Use free trade, as a powerful deterrent to anticompetitive behavior; and

d) subject all public or governmental agencies to the new competition rules, except those with a mandate from Congress to carry out constitutionally exempted activities.

---

7. Previous ones (1931 and 1934) were incomplete and unenforceable.
Along with the drafting of administrative regulations, efforts were directed to obtain funding, a building and equipment for the new agency. A small team of young lawyers and economists were hired to form a proper staff. They were sent to the United States, Canada and Europe for a crash course in theoretical and practical issues of competition enforcement in corresponding agencies. With a staff of around eight professionals and seven administrative personnel, the Federal Competition Commission opened its doors on June 23, 1993, the same day the Act came into force.

III. THE FEDERAL LAW ON ECONOMIC COMPETITION

The Ley Federal de Competencia Económica, like its main counterparts in other countries, comprises general principles of competition. Its vague drafting alarms attorneys who look at it for the first time, most of them unfamiliar with basic concepts of economics and very much at home with the specific wording and straightforward rules characteristic of Roman legal tradition. However, competition, in Mexico and everywhere else, involves a complex interface between law and economics. Perhaps there will never be objective and definite competition provisions carved in stone; its substance derives from economics, a science far from being exact. It is expressed in inevitably obscure and somewhat imprecise formulas. Its components must be understood as a comprehensive body that supposes the existence of an ideal model of perfect economic competition. However, its development over the years promises greater simplicity, like other principles of law with wide reach however simple. We must acknowledge that the general reaction to the LFCE in Mexico has not been very different from the reactions seen in the early years of the Sherman Act in the United States, or the reactions experienced in the European Union which has a legal system that, like the Mexican, is derived from the Roman legal tradition. It will be long before this tension between law and economics disappears in legal systems that reflect a long history of written detail and an environment lacking a competitive business culture. But, as it will be pointed out later on, the LFCE and its general principles shall be developed by implementing regulations, guidelines and general criteria. Otherwise, it may become a source of uncertainty and arbitrary rulings.

In practice, Mexican competition policy eventually will become a sophisticated and self-contained body of law. The LFCE has received positive comments in several fora for its commitment to economic efficiency and for including in its reach the conduct of all state agencies and enterprises.
Perhaps such praise is based on the fact that the LFCE adopted a cautious position by not expressly recognizing predatory pricing and discrimination. This was based on the theory that such behavior is extremely similar to that of ideal competition, and therefore difficult to probe. Considering the problems of enforcement of the infant legislation, this approach has proven to be useful by permitting the CFC to dismiss frivolous suits which are clearly directed to obtain protection for inefficient business performance, rather than claiming a remedy against truly anticompetitive conduct. However, anyone who may find enough empirical evidence of an abuse of a dominant position may try to convince the CFC otherwise: it is only that in such cases the burden of proof is much stricter. Again, this confirms the LFCE’s overall philosophy of protecting the competition process rather than specific competitors. For example, the LFCE does not consider resale price maintenance as a per se (absolute) offense, but rather a rule of reason (relative) offense. The LFCE is consistent with the approach of allowing a case-by-case analysis rather than a draconian or inflexible presumption which may cause serious harm to the functioning of markets.

This is an area of tension, as it concerns the interface between regulated sectors and the LFCE’s enforcement. Indeed, the LFCE, as an umbrella of other regulations, has placed the heaviest burden upon the CFC. The CFC must monitor other regulators’ conduct in federal, state and municipal levels, and prevent and punish anticompetitive actions stemming from the most dangerous source—overlapping political power and vested interests. The perils are obvious, the future outcome not too encouraging, unless the CFC maintains its intended original role as a truly independent agency. This interface represents a make or brake situation for the CFC since it addresses the politics of competition. Governmental agencies are in fact the most powerful factory of anticompetitive practices, as was the English King in the early days of the common law tradition, when monopolies were granted by grace of the Monarch. Antitrust concepts were probably born as a reaction to vested privileges, once they became too powerful for the public interest or the King’s power.

The LFCE contains the basic rules and background doctrines of collusive behavior (absolute or per se offenses): price fixing, market allocation, bid-rigging and information exchanges. It is equipped with a set of rules for relevant market determination and market power assessment. It is designed to evaluate vertical conduct and its corresponding catalogue of restraints (relative or rule of reason offenses). It contains a preventive and punitive chapter on mergers, connected with the same assessment standards applicable to vertical practices. It has provisions on illegal barriers to entry and exit of products from one state to another; basic

---

15. See LFCE arts. 3,4; see also LFCE Third Transitory Article (the LFCE expressly repealed several acts empowering the federal government to control specific areas of the Mexican economy).

16. Antecedentes Económicos at 233; OECD Background paper at 3. The drafters of the LFCE condemn such actions as having no legitimate procompetitive purposes.

17. LFCE art. 9.
procedure rules; monetary sanctions\textsuperscript{18} and an organizational frame for
the CFC. In due course, the LFCE will need several amendments to
justify its theoretical perspective, but not now. The existing law has yet
to be tested; there are many problems that have not been even confronted
in practice to this day, including certain vertical and horizontal restraints,
mergers and interstate commercial restrictions. Such problems are of
formidable potential—if only a fraction of them were to be effectively
confronted, the CFC would be unable to cope with all the necessary
investigations and procedures. The Commission’s resources are minimal
compared to the challenges of enforcement posed by the LFCE.

Before amending the LFCE, the CFC will have to prove that it has
successfully performed its duties under the existing rules, thus justifying
the move to a stricter enforcement bracket. On the other hand, the risks
are that amendments will probably attract interests seeking protection
and will bring political pressure to obtain shelter through a more lenient
set of rules. Competition policy must develop dissuasive or persuasive
precedents of enforcement over long periods of time and promote cross-
fertilization among government and business concerns. The LFCE is too
young and infrequently used to justify substantive surgery at this stage.
But as will be pointed out later, minor instrumental changes could be
advisable at some future stage. It promotes good policy (as has been the
case up to now) to insert competition rules in other statutes and regulations
to avoid regulated exemptions to the basic rules contained in the LFCE.

Mexico needs more competition enforcement because a) today’s econ-
omy is highly concentrated; b) the effects of the profound deregulation
and privatization programs executed in the last ten years, have facilitated
anticompetitive behavior and market foreclosure; c) there has been a long
history of government involvement in the competition process, through
direct mechanisms (price controls, public sector industries, government
purchases, concession and licensing of public activities and so forth), or
indirect pressure; d) there is a lack of competition culture in the business
community; and e) it is reasonable to expect the return of nationalistic
ideologies that tend to support the repeal of free trade instruments and
therefore will claim the return of privileges against the public interest
(through promotion of policies that result in high prices and low quality).

A. Competition Enforcement, 1993-1994

The CFC dedicated the first year to “institutional building” matters:
drafting and issuing internal regulations (division of labor, definition of
officers’ powers, design of basic organization systems, recruitment of
personnel, acquisition of equipment and so forth). Externally, an intensive
program of speeches and presentations was executed in order to explain
the substance of the LFCE and the organization of the CFC among the
business community, government agencies and universities. Leaflets and

\textsuperscript{18} LFCE art. 35.
a modest manual were manufactured and distributed among corporations and law firms. This exercise resulted in limited success, due to lack of interest based on low credibility towards the subject and the unfortunate history of ineffectual law making. From the outset, it was clear that the LFCE and the CFC had to fight against indifference, following a simple but powerful principle: one antitrust enforcement action is worth more than a thousand brilliant speeches. That was the CFC's motto in the early days. There was a firm belief that, no matter how painfully slow the process, even the simplest procedure or document filing system would have to be carefully crafted since its future would depend on its origins. The idea was to create an institution that would meet the standards of any leading law firm: well staffed, responsive, transparent, corruption free, open doors and intellectual honesty, but, at the same time, tough and respected.

It was a high priority to interact with the CFC's international counterparts, in order to develop standards consistent with international standards and to establish a prominent role for the CFC in the globalization process. International cooperation among competition authorities is a major component of free trade. Mexico can only benefit itself by obtaining access to a formidable wealth of information and know-how about markets and international players, interacting in several jurisdictions with different legal rules and procedures. This was a major policy decision in the first year of the CFC.

The CFC began by adopting an enforcement policy based on a balanced "portfolio" of merger analysis, ex-officio investigations, private enforcement, economic research and regulatory issues. Thus, the CFC prepared itself to attack all fronts of its task, maximizing the use of its scarce resources. Some of the matters would be initiated by private parties, but the challenge was for the CFC to take the lead, choosing investigations which could render valid and quick results. After all, one good investigation would send definite signals to induce the necessary corrections in the marketplace. In short, the idea was to first bring to trial those cases most likely for the CFC to win, using its investigative and discovery powers.

Early on, the CFC started to coordinate its activities with other governmental agencies in order to discuss and influence the regulation-making process, so that competition standards would be imbedded in the resulting regulation. This proved to be rather time consuming and sometimes stormy, but, in the end, highly rewarding. The CFC dedicated considerable

19. 94 ANNUAL REPORT at 14. The CFC accomplished much its first year, but recognized that "lack of vigorous competition policy in the past has led to an overly concentrated industrial structure."
20. Id. at 15.
21. In the early stages, the CFC obtained the intellectual support of antitrust experts, like Jim Rill, Bob Willig, Janet Steiger, Ed Hand, Chuck Stark, Joe Phillips and Kurt Stockman, who at the time were officials of the U.S. Antitrust Division; the U.S. Federal Trade Commission; and the Organization for Economic Cooperation and Development.
time to study the competition issues involved in the telecommunications sector, an area of great industrial potential for Mexico.\textsuperscript{22} Starting with the review of TELMEX’s obligations to open up the long-distance market for telephone competition, the CFC recommended that the regulator establish strong incentives for universal service; remove artificial barriers to interconnection; and create clear rules for entry and growth.\textsuperscript{23}

The CFC was also an active participant in the design of the program to privatize and decentralize national ports, promoting efficient rules and preventing anticompetitive conduct. The CFC was consulted on several issues concerning the issuance of new regulations by the President’s Office, which has the last word in the rule-making process within the whole governmental apparatus.\textsuperscript{24} This advocacy function in the rule-making process strongly suggests the need for a system of checks and balances among the several entities of the Executive branch, or even better, among the Legislative and Executive branches of government.\textsuperscript{25}

Among the relevant ex-officio investigations carried out in the first year, one extremely important case involved PEMEX (Petróleos Mexicanos), the oil producing state monopoly, concerning gasoline stations.\textsuperscript{26} The CFC charged PEMEX with unduly blocking entry to new competing gas stations by protecting the geographic territory of existing stations and erecting substantive barriers to entry. PEMEX imposed a “franchising” system, which required gas stations to obtain pre-clearance from PEMEX to sell anything that was not a PEMEX product (even food, soft drinks and other goods or services), and to pay a fee to PEMEX for such clearance.\textsuperscript{27} The outcome of the CFC action was the signing of a consent agreement by PEMEX to remove all requirements to open up new gas stations, except ecological and safety standards; and to eliminate the “franchising” restrictive scheme.\textsuperscript{28} This action, in a period of six months, had already yielded great success. There are now over 400 new gas station contracts with PEMEX, more than PEMEX had authorized in the previous three years, showing greatly boosted investment.\textsuperscript{29} These CFC-induced structural remedies show the great benefits that may be obtained by enforcing basic competition concepts and by restraining new regulated monopolies from distorting markets not covered by their legal activity. This case also shows the importance of removing the de facto authority that public monopolies have exercised through the years, abusing their overwhelming market power.

\textsuperscript{22} 94 ANNUAL REPORT at 41.
\textsuperscript{23} Id.
\textsuperscript{24} 94 ANNUAL REPORT at 43.
\textsuperscript{25} See J. Bowers, Regulating the Regulators (1990).
\textsuperscript{26} 94 ANNUAL REPORT at 33.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} It has been rumored that a large U.S.-Mexican joint venture is planning to open up 200 gas stations equipped with convenience stores.
Another investigation undertaken in the CFC’s first year that deserves mention is the price fixing case which involved several banks in certain auctions of treasury bills issued by the Central Bank of Mexico. This case presents interesting features: a) the impact of faulty regulations in the financial sector to prevent anticompetitive behavior; b) the dangers stemming from the highly concentrated Mexican financial industry through collusive conduct; and c) the legal opposition to CFC’s proceedings on the grounds that banks and financial institutions, as a separately regulated sector, were not subject to the LFCE. The indicted banks agreed to pay the fines imposed by the CFC.

A considerable amount of time was allocated to merger analysis during the first year. The goal was twofold: on the one hand it was crucial to develop a policy that could produce growing and solid criteria of what was to be expected from the CFC, and on the other, such policy would have to be created from the actual pre-merger notification cases, following standard doctrines and international practice. The CFC policy in pre-merger notification was to discriminate between those transactions which evidently were trouble free (vertical mergers with small market share, tradeable products, internal company restructuring, and the like), and those that would require closer analysis (horizontal mergers with high barriers to entry, high market shares). The idea was to issue second information requests only where the CFC had some doubts as to the transaction’s effects on competition and to create, from the outset, some interest in creating special files on the corresponding industry. Waiting periods and information requests were designed to create as few obstacles as possible, in order not to stop the market’s natural dynamics. Everything was to be done with an open doors attitude and direct communication with the companies subject to investigation. Perhaps the CFC’s greatest obstacle in merger analysis was the lack of solid data. With few exceptions, filings were lacking adequate market data and the data available were of little relevance. However, the CFC found remarkable cooperation from companies, even from those not directly involved in the transactions.

One particular transaction filed during the first year deserves comment. Grupo Condumex, S.A. de C.V. a major manufacturer of cable, intended to gain control over Conductores Latincasa, S.A. de C.V., another important cable producer. Grupo Condumex, S.A. de C.V. is owned by Grupo Carso, the controlling shareholder of Teléfonos de México S.A. de C.V., the telephone monopoly. In this case, the CFC found that the resulting entity would control over seventy percent of cable sales. The CFC established a clear precedent concerning the removal of the corporate veil and considered “effective control” as the proper test for

30. 94 Annual Report at 34.
31. 94 Annual Report at 17.
32. See id. at 17-29.
33. 94 Annual Report at 26; LFCE art. 21.
34. 94 Annual Report at 24.
a merger assessment, thereby including Grupo Carso and its interest in TELMEX as an integral part of the entity subject to analysis.³⁵ The CFC found that Grupo Carso, by merging and concentrating the cable and telephone industries, would increase its market power and thus facilitate discrimination against other cable producers in the purchasing of cable for the telephone company.³⁶ The analysis revealed considerable entry barriers. The filing parties decided against the transaction after the imposition of conditions by the CFC requiring Grupo Carso not to increase its control of Condumex and another cable subsidiary and to force TELMEX to buy from the cheapest source.

The CFC took a cautious position with respect to the establishment of competition precedents. The CFC recognized its own lack of experience and the need to wait for a large enough number of cases of sufficient caliber. However, the CFC in the first year did set up criteria on three different subjects. The first criteria concerned the so called “covenants not to compete.”³⁷ These are rather common in business transactions, especially in the sale of enterprises and in business executives’ labor contracts. In both cases there are considerable efficiencies that more than compensate for their possible anticompetitive effects. In the first case, the buyer is interested in “buying out” a potential competitor, in order to maximize his possibility of success and the seller wants to maximize its return by offering to stay out of the particular market. In the case of labor contracts, a company wants to protect its marketing or technical know-how by hiring someone who is prepared to honor an obligation not to work for the company’s competitors for a certain period of time. In both cases, the CFC concluded such covenants were not illegal for competition purposes.³⁸ However, in view of possible abuses, the CFC determined that such covenants would have to carry specific time-limits; include only specific subjects directly related to the relevant transaction; and contain geographical limitations. It also stated that those transactions involving covenants not to compete for a period longer than five years, and those not involving the simple transfer of distribution channels or similar assets would be closely supervised by the CFC, and would require specific justification, when included in a pre-merger notification filing.³⁹

Another important signal issued by the CFC in the first year concerned the nature of strategic alliances purely for research and development purposes.⁴⁰ The CFC considered such arrangements permissible for competition purposes, except when such arrangements were designed to disguise price fixing, market allocation or other anticompetitive schemes among competitors.⁴¹

---

35. Id. at 25.
36. Id. at 24.
37. 94 ANNUAL REPORT at 28.
38. Id.
39. Id.
40. Id.
41. Id.
The third administrative interpretation issued by the CFC is of particular importance; it addresses the extra-territorial reach of the LFCE.\textsuperscript{42} The CFC stated that it may claim jurisdiction over conduct or transactions executed abroad that generate effects in the Mexican territory.\textsuperscript{43} This precedent endorses the “effects” doctrine, accepted by Mexico’s main commercial partners.

Regarding private enforcement, 1993-1994 was a period of little activity.\textsuperscript{44} Most of the suits brought to the CFC were badly researched, based on poor theory and provided inadequate empirical evidence. The vast majority had to be dismissed on purely formal grounds or for lack of persuasive rationale. Poor results in this area can probably be associated with an old Mexican tradition of regulatory failure and the natural reluctance of companies to sue mighty upstream players. (This position is highlighted by an old popular saying: “You should never fight with the cook”).

\textbf{B. Competition enforcement, 1994-95}

As the corresponding CFC’s \textit{ANNUAL REPORT} has not been released at the time of writing, comments are pending. However, it shall be noted that two major decisions were severely attacked by the media. The first was the clearance of a transaction by which a subsidiary of TELMEX bought forty-nine percent of CABLEVISION, the second largest cable network. The second was the clearance of a transaction by which RADIO CENTRO bought RADIO RED and concentrated about forty-six percent of the Mexico City radio audience.\textsuperscript{45}

\textbf{C. Enforcement Challenges}

The CFC will have to function with an increasing level of technical sophistication and discipline. The following are some of the areas of concern:

1. Separation between the investigation and decision stages

The investigation and decision stages of the process must be kept divided in order to avoid the temptation to justify badly conceived theory and faulty information gathering. Internal checks and balances are important to induce efficient competition among the two levels of performance and to mitigate the negative effects of having the prosecution and ruling functions within the same agency. The CFC’s structure was designed with two objectives in mind. First, both the prosecuting arm (executive secretariat) and the decision arm (commissioner’s panel), co-

\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 37.
\textsuperscript{45} 95 ANNUAL REPORT (forthcoming July 1996).
ordinated by the CFC's chairman were to be under the same roof.\(^4\) However, if the Commissioners intervene before cases are fully investigated, the Commissioners (who enjoy deciding powers) then become interested parties, breaking the system's division of labor. This arrangement was a major departure from the United States, Canadian and European models and can only be justified if the separation is rigorously respected. Second, there was a need for a two-tier procedure to reduce arbitrary decisions and to provide a double check on cases. The Executive Secretary must defend his cases before the deciding panel, consisting of five commissioners. The Commissioners are a balancing power over the power enjoyed by the Secretary (as a result of his large staff).\(^4\) In any case, the Commissioners can always overrule the recommendations of the Executive Secretary and return them until they are fully satisfactory. The natural tension created by this internal structure proved to be highly efficient during the first two years of the CFC's existence.

2. Accountability

The CFC must be exposed to transparent processes. Its rulings must contain fully reasoned decisions and their supporting materials should be publicly available. Without legal amendments, this is now possible. Data and materials gathered or submitted may be confidential but decisions (or relevant parts of them) are not. The CFC should publish its administrative decisions and dissenting opinions as a permanent policy. This will boost its credibility, impede badly founded decisions, and provide an incentive for internal competition and hard work.

3. Definition of analytical tools

The CFC must internally define its technical tools and make them public. Such tools include basic criteria to define relevant markets (product market and geographic market), expressed in a simple and consistent approach; to find specific criteria to assess dominance or "substantial market power" (market shares, use of a concentration index, purchasing power, ease of entry tests and their relative weight in deciding cases); to determine the role of efficiencies and international competition coming from imports, and so forth.\(^4\) The CFC's decisions should be free from improvisation or "hunches" and rely as much as possible on hard data and technical arguments. These criteria may be issued separately or, even better, could be published as guidelines or established in the implementing regulations.

\(^{46}\) LFCE art. 25; Reglamento Interior art. 14. The President of the CFC has only a tie-breaking vote. LFCE art. 25. Nevertheless, the President or the President's official substitute must participate in all decisions of the Pleno. Reglamento Interior art. 14.

\(^{47}\) LFCE art. 29; Reglamento Interior art. 25 (The Executive Secretary acts as the CFC's chief administrative and operating officer and represents the CFC in all contested administrative and judicial proceedings, including representing the President of the Republic in amparo actions challenging the CFC's decisions.

\(^{48}\) LFCE arts. 12 and 13; See also Antecedentes Económicos at 234-35.
4. Repeal regulatory capture

The CFC should defend the public interest, not individual interests, whether stemming from private parties or other governmental agencies. The competition rules and enforcement process should not be subordinated to the interests of regulated firms. In the CFC's case, it is clear that its activity is not unchecked, but rather subject to supervision by the federal courts, if only to guarantee that due process of law and other constitutional rights have been respected. Of course, there is the force of public opinion and the media (if honest), to provide an extra guarantee of at least some degree of accountability and transparency.

Looking to the influence exerted by other regulatory agencies, the CFC must play an extremely important technical and political role that may take the pressure off some of those agencies, by having a different and objective function which may neutralize negative influence. As to corruption, it is clear that the CFC must be regarded as a model of immaculate performance, transparency, technical strength and, of course, credible enforcement. Due to the highly sensitive impact of competition law, the business community, sooner or later, will press for a straightforward and clear enforcement policy that can only be implemented by an agency with such characteristics.

5. Implementation of investigations

The CFC should invest most of its resources in new investigations, since its impact may be greatest in keeping markets alert and properly checked. There are many areas of industry and commerce that need the most basic surveillance and encouragement of competition influence. Most corporations are not aware of the Act and its reach, so, besides voluntary persuasion, it is important to cover, through actual enforcement strategies, areas badly affected by a lack of effective competition conditions.

6. Simple and speedy procedures

Traditionally known and practiced procedures in Mexico can be a great obstacle to efficient enforcement when not designed or conducted properly. The CFC has yet to find procedural short-cuts or to develop an efficient pre-trial mechanism in order to waste as little time and resources as possible. Being a specialized agency, the CFC may tailor implementing regulations to the needs of fact-finding and assessment which are peculiar to competition's substantive rules.\textsuperscript{49} Being quasi-judicial in nature, the CFC has a great advantage by being able to hear cases with an almost exclusive jurisdiction and within a self-contained system of rules and criteria. If wisely and professionally conducted, procedure on competition issues can become a model for speedy and no-nonsense administration, without overlooking the great importance of following strict formalities.

\textsuperscript{49} LFCE art. 18. See 94 ANNUAL REPORT at 25-29 for the CFC's "General Criteria for Assessing Mergers."
and rigorous principles. Failure to do so may result in an extremely harmful interference by judges that could paralyze the CFC’s functioning.

7. Intellectual output

The CFC must be a permanent source of technical opinions on regulation and competition, always keeping abreast of the latest theoretical and practical developments. Both the Executive Secretariat and the deciding panel of commissioners should produce papers for publication and comment, and improve on a permanent basis the caliber of their knowledge, to be used a) as critical stock for case-solving; b) as crucial information to issue opinions on public policy or regulatory matters; c) as a means to avoid obsolescence; d) as an instrument of publicity; and e) as an academic exercise to spur debate.

The current economic crisis attracts ultra-radical antitrust ideology (ultra-Chicago School style thinking) that goes very well with a “hands-off” policy, highly advocated by vested private and public sector interests. The CFC must generate analytical and legal devices to offset such pressure or else close-down and avoid the corresponding costs to society.

8. Merger procedures

Merger analysis should increasingly become a standardized and objective exercise.\(^{50}\) The CFC will have to implement double check investigations on the data provided in filings and information requests. It will also need to conduct consumer surveys and obtain solid information from questionnaires or testimony from companies involved in horizontal competition and/or up-stream or down-stream relationships, as well as independent experts’ advice.

9. International cooperation

As already mentioned, the CFC must maintain permanent contact with the theory and practice of competition in other parts of the world and also engage in substantial cooperative efforts with its counterparts in other countries. The benefits are clear: the CFC gets precious information from a globalized environment, as well as analytical tools already proven in much more developed enforcement systems. The CFC must engage in a cross-fertilization process to enhance its enforcement activity, now that “trade and competition go together,”\(^ {51}\) especially in cross-border situations.

The CFC must play an active role in the highly professional fora that specialize in competition issues and cooperate with other countries through memoranda of understanding, treaties or other institutional arrangements—keeping reciprocity as a basic principle. Cooperation is a rule in today’s enforcement efforts. With NAFTA in place, Mexico cannot but

\(^{50}\) 94 ANNUAL REPORT at 25-26; LFCE art. 20.

\(^{51}\) Professor Eleanor Fox’s now classical term.
take this challenge seriously to keep the new pace of inevitable interdependence in antitrust issues.\textsuperscript{52}

\textbf{D. The LFCE and its implementing regulations}

The law itself, although it needs to be fully tested over a longer period of time, may need some adjustments in certain areas such as the following:

- a clear statement on its extraterritorial reach;
- a complete set of rules on research and development schemes to be exempted, along the lines of the corresponding law in the United States;\textsuperscript{53}
- some rules to clarify what is meant by "intent" in per se offenses;
- some limited exemptions based on a de minimis threshold, including agricultural or fishing mixed associations;
- some elements of "monopolization" as a per se offense as unilateral conduct;
- some criteria involving discrimination and predatory pricing;
- procedure clarification as to granting justiciability to private parties in opposing mergers;
- rules to grant antitrust immunity to corporations or individuals who are prepared to render testimony or documents to the CFC.

As to the implementing regulations, ideally some of the following aspects will be developed, among others:

- clarification of the labor union exemptions;
- a detailed exemption for conglomerate mergers;
- a full set of rules governing patents, trademarks and other intellectual property instruments;
- rules to clarify and detail merger analysis procedure, methodology and assessment criteria and their specific weight, as well as the waiting period and second request timing and effect;
- a full set of rules governing consent decrees or agreements;
- rules on decision-making procedures and transparency requirements.
- full regulation on division of labor matters within the Commission.
- specific formal and analytical requirements for merger filings;
- specific formal and analytical requirements for private suits, including the rules for a pre-trial procedure;
- rules on damages assessment;
- a detailed and comprehensive procedure, on a step by step basis and with the proper time limits and rules of evidence;
- detailed criteria for the administration of the "reconsideration" procedure;
- a special procedure for assessing regulated sector activities, such as the telecommunications industry, railroad industry, energy

\textsuperscript{52} International Antitrust Enforcement Act of 1994, 15 U.S.C.A. §§ 6201-6212 (West Supp. 1996); see also the ABA REPORT.

industry and other concession or licensing provisions contained in other laws requiring CFC clearance, as well as rate-setting mechanisms in such sectors.

IV. CONCLUSION

Future effective enforcement in Mexico will increasingly depend much more on private actions. The CFC's limited resources make that unavoidable and certainly more efficient. A CFC with credibility and an active enforcement policy and a growing awareness of competition rules among the business community will provide the frame for that to happen sooner rather than later. When it happens, enforcement will not be a matter of choice. Competition is an essential component of the basic rules of a free market economy and, indeed, of the Mexican Constitution. To exclude competition enforcement is not a matter that could be obtained without cost. Finally, one must ask whether Mexico is now ready for an active competition policy? The answer is common to another question: is Mexico ready for an active law and order policy or NAFTA?