Landmark Cases Related to Proceedings Commenced by the CFC for Monopolistic Practices

Leon Ricardo Elizondo Castro

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/vol9/iss1/9
LANDMARK CASES RELATED TO PROCEEDINGS COMMENCED BY THE CFC FOR MONOPOLISTIC PRACTICES

LIC. LEÓN RICARDO ELIZONDO CASTRO*

All of the forecasting done by the private practitioners and the entrepreneurial community in Mexico is now coming to fruition, as is the realization of the goals originally envisioned by the Congress of the United Mexican States when passing the Federal Law of Economic Competition, or *Ley Federal de Competencia Económica* (FLEC). This is due in part to several cases recently tried before the *Comisión Federal de Competencia* (CFC), in addition to the criteria that have been produced by the federal courts in construing the FLEC and its Regulations.³

Since the inception of the FLEC, supporters of the legislation claim that this is a “natural and necessary complement to Mexico’s new economic policy, which relied extensively upon privatization, deregulation, price liberalization and international trade liberalization.”⁴ Additionally, the FLEC was considered a cornerstone of Mexico’s ongoing program to diminish the government’s role in the economy and to allow free competition to become the Republic’s prime economic engine.⁵

One of the main factors contributing to the accomplishment of the goals previously mentioned and the strengthening of the enforcement of the FLEC came about when the regulations were promulgated by the federal executive. These provisions sought to clarify the proper application of the law and prevent excessive discretionary decision-making by authorities in the application of the FLEC.⁶ Several quite interesting issues have arisen out of the recent investigations in which the CFC has applied its economic criteria to public entities, the assessment of market power when it is jointly exerted by several firms, and the failing company defense, among others.

---


2. Federal Competition Commission, created by the FLEC.
5. Id. at p.184.
6. Three essential points have served as the basis for formulating the Regulations (i) Several concepts and criteria were clarified to facilitate application of the LFCE on the basis of the Commission’s four years of experience and drawing on the opinions of judges, attorneys and academics; (ii) We have sought transparency in the Commission’s interaction with the private sector and the prompt and timely airing of all matters, establishing short timeframes for resolving private sector applications; (iii) Various criteria used worldwide in these matters have been taken into account Section I of the procedure reiterates the powers of the Commission to initiate investigations when it knows of facts that could constitute monopolistic practices, prohibited concentrations, or failure to give notice of the concentration, in accordance with Article 20 of the LFCE. In the latter case, only the Commission may initiate a proceeding. In the first two cases, a procedure may be initiated at the request of a separate party.
In October 2000, the CFC ordered that the two main Mexican airline companies, Aeroméxico and Mexicana, be sold to independent owners. This ruling was issued in response to the review by the federal government at the request of IPAB, which holds sixty-six percent of the corporate voting rights in Cintra, S.A. de C.V., a holding company which controlled both Aeroméxico and Mexicana. Additionally, the banks held 21% of the voting stock in Cintra.\footnote{With the arrival of the banking crisis, which was aggravated in 1995, part of Cintra’s assets became the property of FOBAPROA (Fondo bancario para la protección de ahorros) (Banking Fund for the Protection of Savings), later the IPAB. This is how the latter inherited majority ownership of the company’s corporate voting rights. The federal government currently holds, directly and indirectly, a 66% share of the company, while the remainder is in the hands of Banamex, S.A.; and Bancomer, S.A.; and the investing public at large.}

The decision to separate the market shares of these two companies has triggered numerous criticisms expressing the concern that independent non-governmental operation of the companies would jeopardize development of commercial aviation in Mexico and employment in that industry.

In order to understand the reasoning behind the decision to break up these companies, it is necessary to have at least a minimal understanding of the background on this issue.

At the end of the 80’s, Aeroméxico and Mexicana were privatized using different privatization procedures. At that time, management for each of these companies was relatively inexperienced and had entered the airlines industry at a time when expectations for the development of the industry were quite high. Then in 1991, with the entrance of new passenger airlines into the market, an intense price war arose between Aeroméxico, Mexicana and the new competitors. Implementing aggressive commercial strategies, the two major companies gained an inordinate market share by reducing their fares, ultimately benefiting passengers.\footnote{The CFC analyzed the banks’ request in line with the following considerations: (i) that an imperfect partnership existed between the two airline companies, which began prior to the entrance into force of the LFCE. This was inadequate both for company operations and for competition in regular passenger air transportation within the country; (ii) that it was essential that effective competition be established as soon as possible in the market, hence between Aeroméxico and Mexicana; and (iii) that as long as complete competition was not re-established, the CFC should have control mechanisms aimed at avoiding antitrust practices.}

Notwithstanding the companies’ respective market shares, high operating costs and excessive debt resulting from poor management, combined with inadequate supervision of new competitor operations, placed Aeroméxico and Mexicana at the brink of bankruptcy. This scenario created the false perception that the Cintra airlines had failed due to market competition.

In May of 1995, the banks that controlled Aeroméxico and Mexicana filed with the CFC the pre-notification required by the FLEC\footnote{See articles 20 and 21 FLEC.}, allowing the formation of a holding company for the shares of both Aeromexico and Mexicana. This was done to create a financial vehicle that would enable the banking institutions to manage the liabilities of the aviation companies.\footnote{Between 1993 and 1994 the volume of passengers rose from close to 15 to 18.4 million passengers, growth that is equivalent to 22.6% of airline passenger traffic in 1993.}

However, the FLEC and its regulations provide no defenses like those that exist in foreign jurisdictions. Particularly lacking is the failing company doctrine...
recognized by American courts, which makes the Clayton Act and its regulation of the acquisition of a competitor's assets inapplicable to such an acquisition when that competitor is in such dire financial straits that failure of the enterprise seems inevitable. In the United States, in order for this doctrine to be applicable, it must be demonstrated that the failing company was bankrupt or on the brink of bankruptcy. Such was the case when the banks controlling the Mexican airlines requested the CFC authorization seeking to form a holding company.

In view of the circumstances involved in this case, and under the provisions of the FLEC, the CFC ordered the temporary creation of Cintra. This formation was authorized subject to the creation of a set of measures that would prevent abuses of market power and maintain separate operation of the companies for a term of three years. Subsequently, the companies were to be sold. The core issue for the CFC was, and still is, to prevent market abuses and practices which inhibit competition in domestic airline routes.

In response, Cintra requested that the case be reconsidered, arguing that the three-year term was insufficient to allow for an adequate financial restructuring. Realizing the validity of Cintra's concerns, the CFC changed the term from three years to an undefined term, and introduced several modifications so as to have close supervision over the companies' conduct. This change was predicated upon the restructuring of both companies' financial and operative affairs. Once the objectives of the restructuring were accomplished, or in the event of a failure to comply with the conditions, the companies were to be divested. Cintra consented to the terms set by the CFC as well as to the procedure to be followed in case of breach or failure by the companies. 11

The most recent information available indicates that from 1994 to 1999 Cintra increased its strength within the market both financially and operatively. As a result, the pre-existing risk of bankruptcy dissipated. A first example of the success of the company's financial and operating restructure was observed in 1998 when the company proposed the possibility of a public stock placement in several stock exchanges.

Notwithstanding this apparent financial success, such success has been plagued by a deterioration of competitive conditions in the Mexican airline industry. This is in large part due to a strengthening of Cintra's market power and to the precarious financial situation of its competitors, including the recent bankruptcy of one such competitor.

Cintra's airlines offer regular air transportation services between Mexican cities. Each link between a pair of airports or cities within the country forms a specific market. Competing companies within the various routes offer similar flights. Other passenger transportation services, the most important of which is transportation by

11. The procedure was as follows: "The Commission will periodically review the conditions of competition prevailing in the pertinent air transportation market. If the reports issued to such effect conclude that conditions of effective competition do not exist, the Commission shall instruct the promoters as to the actions that they must perform in order to help establish such conditions. The Commission may order that competition practices be suspended or corrected or order a partial or total divestiture of the economic agents involved in the transaction served, as well as to impose the remaining sanctions foreseen in the Law." In order to conduct this follow-up, the Commission had to periodically assess conditions of competition with the support of an independent consultant.
bus, present substantial differences in terms of quality, price and travel times. As such they are not analogous substitutes.

The geographic dimension corresponds to Mexico’s national territory because there are regulatory barriers, which prevent free competition of foreign airlines. Thus, the relevant market is the regular air transportation of passengers within the national territory.

At the beginning of 1999, Cintra’s airlines transported 71.7% of all passengers traveling within Mexico. As a result of the departure from the market of one competing company, Taesa, Cintra’s market share rose to 79.9% in December 1999. When the airlines are analyzed independently, the figures corresponding for 1999 provide a Herfindahl rate of 2,860. When the companies are consolidated, this rate rises to 5,380. The companies’ rate of dominance, when considered separately, stands at 4,570, while it would be 9,140 if consolidated. Both rates measure the level of concentration on a scale of 0 to 10,000.

Using figures from December 1999, the previous rates stand as follows: the Herfindahl rate rises to 3,430 if the companies are kept independent and to 6,558 if they are combined; while the dominance rates increase to 4,951 and 9,526, respectively.

The aforementioned calculations demonstrate that the levels of concentration would greatly exceed the criteria established by the CFC. The Herfindahl rate, even without consolidation, is well above 2,000 units and its increase would substantially exceed 75 units. The dominance rate stands well in excess of 2,500 units and this amount does not decrease after consolidation.

Because each route represents a separate market, Cintra’s concentration is higher than nationwide market share averages. In 1999, in a sample that included 41 of the major routes for domestic airline passenger traffic in which Cintra’s companies operate, the concentration of Cintra would well exceed all thresholds. This fact demonstrates why it is highly likely that Cintra would be in a position to unilaterally set prices or restrict the supply of regular passenger air transportation with outside unrelated competitors being virtually unable to offset this power.

The main financial barrier for new competitors is the high cost of setting up an airline company. This service requires a great deal of operating capital, highly skilled personnel, and complex organizational, administrative and marketing systems. New entrants into the civil aviation market face barriers such as the cost of promoting their services, consumer brand recognition, and commercial practices to promote user loyalty, such as frequent flyer programs. Furthermore there are

---

12. The Civil Aviation Act of Mexico and bilateral agreements prevent foreign companies from being involved in domestic air traffic. See art. 18. Furthermore, the Foreign Investment Act (LIE) sets a 25% ceiling on direct foreign participation in air transportation companies, which precludes foreign companies from acquiring control of a domestic company. Although the LIE allows foreigners to have additional indirect ownership, in practice neither direct nor indirect foreign investments have been authorized in domestic air transportation companies. See art. 7-11 (a). D.O., Dec. 27, 1993

13. The Commission has taken the position that there is little likelihood that a concentration will affect free market participation and competition when the Herfindahl rate does not exceed 2,000 units; when the increase in the rate does not exceed 75 units as a result of concentration; when the rate of dominance is less than 2,500 units, or when the value of the latter rate declines as a result of concentration (See the Resolution that notifies the method for calculating the rates to determine the degree of concentration that exists in a relevant market and the criteria for its application, D.O., July 24, 1998).

14. See articles 17 and 18 PLEC.
practices in existence among already established companies; such as interline agreements and co-coding programs that limit access of new suppliers. Furthermore, artificially maintaining companies in the market (exit barriers) as was done in the previous administration, represents a negative incentive for entry of new companies and generates uncertainty and a lack of legal security for new market entrants that would be forced to compete against bankrupt airlines.

In addition to the entry barriers, there are regulatory barriers in the domestic air transportation market which impede the development of a new airline company. There are limited airport space allotments. Rules of seniority prevail, thus favoring existing companies particularly during peak hours, such as in the Mexico City airport, which is the most important point of origin and destination in domestic and international routes. Added to the above are obstacles in the granting of concessions and route permits. These economic and regulatory entry barriers create substantial obstacles to the entry of competitors into the market and reinforce the market power of Cintra’s companies. It is important to note that the Commission has also filed procedures regulating rates, and commissions paid to travel agencies, as well as other matters which reflect market power.

In light of its consideration of the foregoing issues, the CFC concluded that the unconditional sale of the Cintra airlines combined would create an economic entity with the power to unilaterally set prices, which would hinder free competition within the market. This would represent a concentration forbidden by the LFCE. It is for this reason that the CFC ordered the companies to be sold separately to independent buyers.

Regarding the sale of the companies, if the CFC were in fact to authorize the joint sale of the companies, the conditions that would need to be imposed to avoid the effects of concentration would be much more strict that those now in existence. Given their market power, the companies would have been subject to price controls, asymmetrical access regulations regarding routes, frequencies, airport shifts and facilities, opening frequent flyer programs and interline agreements. In view of the lack of competition, the joint sale would have significantly increased the need to open the market to foreign competition and investment, as well as to accelerate reciprocal agreements containing “open” domestic routes, and to open the skies in international routes as well.

It is likely that these new conditions would considerably reduce the value of the companies and could feasibly make their sale impossible. This would clearly be contrary to the pecuniary interests of the shareholders. Therefore, given the market concentration, entry barriers and other elements analyzed, the unconditional sale of the combined companies is contrary to the Federal Competition Act and is not considered a viable option.

In conclusion, the resolution issued by the CFC to create Cintra made it possible to regulate the legal status of the companies, to restructure their finances, and to avoid bankruptcy for both Aeromexico and Mexicana. The core issue for the CFC is that the Commission ensures effective competition in the domestic air transportation market. Given the protected status of this market, foreign companies do not represent any real competition for national companies. Experiences in other countries clearly show that competition brings benefits for the air transportation industry, derived from substantial growth in the volume of passengers. Developing efficient companies benefits all sectors of economic activity and the general public.
Keeping the companies together would jeopardize growth of the industry and employment, as well as incur significant costs for consumers.\textsuperscript{15}

**STATE ENTERPRISES AND THE BOUNDARIES OF THE LEGAL MONOPOLIES**

One of the important goals of the LFCE is to expose state enterprises, and the government itself, to the forces of competition. In promoting the proposed law, the FLEC's drafters noted that many anticompetitive practices have their origin in the conduct of the public sector as buyer, seller, concessionaire, and price regulator.

One example of this is the investigation conducted by the CFC of Pemex-Refining (Pemex). Pemex allegedly engaged in conduct to suppress and eliminate competition. Such activity is in direct violation of Section I of Article 10 FLEC,\textsuperscript{16} as this would have the effect of displacing other agents from, and impeding access to the sale of motor oil in gas stations. This was allegedly done in an attempt to establish exclusive advantages in favor of one entity - Pemex.

The fact that Pemex was a subsidiary of a decentralized entity of the federal government is quite relevant, as this case reflects the broad application of article 3 of the FLEC, regarding public entities.\textsuperscript{17}

Pemex Refining is one of four decentralized subsidiaries of Petróleos Mexicanos ("Pemex"), engaged in the industrial process of refining, and manufacturing oil-based products and petroleum by-products. In accordance with article 27 of the Mexican Constitution, petroleum resources are reserved exclusively to the Nation and are managed by the State, through Pemex, a decentralized governmental agency created in 1958. Its subsidiary decentralized entities were created in 1992. In other words, Pemex Refining is the sole refiner of petroleum products, and has the legal monopoly in the gasoline and diesel market. Until the 1970's, the manufacture of lubricant oil was exclusively carried out by Pemex.\textsuperscript{18} However, since that time, national and foreign private companies have begun importing lubricating oil or manufacturing it in Mexico. They have begun to gain considerable ground in the overall market shares they possess. Although the lubricant oil market was opened

\textsuperscript{15} Most of the information in this section was obtained from the publication done by the CFC, named "Documentos Caso Cintra, Resolución Sobre su Venta", at the mid of 2000.

\textsuperscript{16} Article 10 provides: "Subject to the verification of articles 11, 12 and 13 of this Law relative monopolistic practices are considered to be those acts, contracts, agreements or combinations, which aims or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favor of one or several entities or individuals, in the following cases: I.- Some economic agents that do not compete among themselves are: to set, impose, or establish the exclusive distribution of goods and services, by means of the subject, geographical location, or specific periods of time, including the division, distribution, or assignment of customers and suppliers, and also the obligation to not manufacture or distribute goods or services for a specific period of time or that may be specified.

\textsuperscript{17} Article 3 provides "All economic agents are subject to the provisions of this law, whether individuals or corporations, agencies or entities of the federal, state, or local administration, associations, professional groups, trusts or any other form of participation in the economic activities.

\textsuperscript{18} A significant background showing the evolution of the industry from a competition point of view, is that in 1938, Pemex also had the legal monopoly in the lubricant oil market, since strategic industries of petroleum explicitly included manufacture of lubricant oil. In 1971, regulations were adopted permitting any person interested in manufacturing lubricant oil to do so by requesting a government permission that was commonly known as the petrochemical permit. See the Regulation of the Law Implementing Article 27 of the Federal Constitution regulating the Petroleum Industry in Petrochemical matters. DO February 9, 1971. Furthermore, in 1990 the petrochemical permit was abolished, opening the lubricant oil market to competition. See the Abrogating Decree of Article 11 of the Regulation aforementioned. D.O. January 8, 1990.
to competition, Pemex continued manufacturing lubricant oil, not only as the entity in charge of a strategic industry, but as an economic agent competing with other oil manufacturers or importers.

Toward the end of 1992, Pemex Refining offered at public auction, 51% of its shares in a new company. This new entity would be engaged in the manufacture, production, development, and trade of Pemex brand oil. Pemex Refining would retain the remaining 49%. An attractive consideration for the private investors, was that Pemex offered to grant the new shareholder the exclusive right to trade lubricant oil in gas stations, an extremely lucrative proposition. Following the auction and the establishment of the new company, dubbed Mexicana de Lubricantes ("Mexlub"), this entity had the exclusive right to trade Pemex motor oil in the gas station market, currently composed of about 5000 stations.

The relevant market here was defined as the motor oil trade within gas stations. This market definition was based upon the following considerations: i) the absence of substitutes for motor lubricant oils; ii) types of clients or consumers, and transactional costs of buying motor oil in places other than gas stations while filling one's gas tank, including a time factor, iii) distribution channels used by oil companies, including Mexlub; iv) Pemex Franchise; and v) other legislation affecting the lubricant oil industry.

In order to operate a gas station, the operator must obtain a franchise agreement and a supply contract. In both of these contracts, there is an exclusivity clause which required that only motor oil of Pemex brand be sold in gas stations. Breach of this exclusivity agreement by the franchisee resulted in contract termination. However, the CFC determined that a provision requiring such exclusivity lacked a legitimate basis, because the motor oil market is a non-monopolized market. Nevertheless, Pemex Refining had a legal monopoly on the "first hand sell" of gasoline and diesel, and could therefore legally preclude any and all would-be competitors from selling these products. But, according to the CFC, Pemex Refining's legitimate monopoly did not exceed this narrow definition. Due to its decentralized nature, Pemex could only act in accordance with the existing laws, and none of these laws allow the incorporation of an exclusivity clause in contracts providing for the sale of motor oil in gas stations.

Within this defined relevant market, Pemex Refining had substantial power, amounting to a 100% share of the gasoline and diesel market, and in 1991, a 46.9% share of the motor oil market, which, according to the CFC, granted the entity excessive power. Therefore, the inclusion of the exclusivity clauses in the franchise and supply contracts entered with gas stations franchisees, was considered an abuse of such market power.

By virtue of its having substantial power in the relevant market, combined with the imposing exclusivity clauses, the CFC ruled that Pemex Refining had violated Section I of Article 10 of the Federal Law of Economic Competition.

---

19. By that time a large number of companies competed in the lubricant oil market, and Pemex's market share had descended to 46.9%. Pemex sought to impede further market loss, alleging that the decentralized nature of the entity was an obstacle in obtaining economic benefits.
Another very interesting legal issue was the retroactive application of the FLEC.\textsuperscript{20} Nevertheless, the investigation did not attack the existence of the contract itself but the effects experienced in the competition process.

The exclusivity was conferred on January 13, 1993, the date on which Pemex Refining and the winning company in the public bidding entered the association contract. However, the violation of the FLEC did not actually begin until June 22, 1993, when the FLEC became effective.\textsuperscript{21}

In August of 2000, the CFC forced Pemex Refining to amend the exclusivity clauses contained in its gasoline franchise and supply contracts, and in any other document and/or contract that contained this clause. Furthermore, Pemex was ordered to pay a fine of US$ 912,932\textsuperscript{22} for engaging in conduct which had the effect of suppressing and eliminating competition in violation of Section I of Article 10 of the FLEC. This violation, according to the CFC, occurred through the displacement of other lubricating oil manufacturers and impeding their access to the motor oil trade within the gas station market.

FORBIDDEN CONCENTRATION THROUGH AN INVESTIGATION PROCEEDING

In 1999 the first case of a forbidden concentration was tried before the CFC under its investigation process.\textsuperscript{23} Although the CFC had challenged some concentrations prior to this time, these challenges had come only after a pre-notification proceeding,\textsuperscript{24} which is quite different from an investigation conducted after a claim has been filed. Prestaciones Mexicanas, S.A. de C.V. (Prestamex) filed before the Federal Competition Commission (CFC) a complaint against Prestaciones Universales, S.A. de C.V. (PU), alleging an unlawful merger in the market of employer coupons, in violation of Article 16 of the Federal Law on Economic Competition (FLEC).

An additional peculiarity of this case was that at the time the transaction was analyzed, the recently incorporated firm under investigation actually possessed no market power. However, the potential to obtain such power by impeding access, refusing to deal and through the commission of monopolistic practices clearly existed under Article 17 of FLEC. Therefore, the CFC held that there was no need for a current and actual effect in the competition process; it was enough that the possibility for damage existed as a real consequence of the transaction.

Toward the end of 1998 the most important supermarket corporations in Mexico\textsuperscript{25} incorporated a new firm: Prestaciones Universales (PU), with its main

\textsuperscript{20} See article 14 of the Mexican Federal Constitution.
\textsuperscript{21} Indeed, the FLEC was published in the Official Gazette of the Federation on December the 24th 1992, 20 days before the association contract was entered into. In other words, the contract was entered into throughout the \textit{vacatio legis} of the law.
\textsuperscript{22} At an exchange rate of $9.35 pesos a dollar.
\textsuperscript{23} In an investigation proceeding the procedural requirements provided in Article 33 of FLEC and in sections 23 and 28 through 41 RFLCE, must be previously met.
\textsuperscript{24} See article 20 and 21 FLEC.
business objective being the issuance of employee coupons. This kind of firm operates by issuing coupons that are acquired by other corporations (customers). The latter gives the said coupons to its employee, which exchanges them for goods and services. The coupons are an employee benefit and means tax deductions for the coupon issuing corporations. The employee exchanges coupons for goods and services in supermarkets, department stores, restaurants and gas stations (affiliate stores).

The relevant market in this case was defined as the issue, trade and distribution of employee coupons in which the coupon firms participate.

After considering arguments of the claimant and the defendants, the CFC ruled that from the market perspective it was more efficient to have more competitors within this market. However the combination of the supermarkets in forming the new company, PU, would effectively displace the competitors and so could have adverse effects on competition. Therefore the concentration was held to be a violation of the FLEC and its subsequent divestiture was ordered.

**JOINT MARKET POWER**

The CFC recently raised another issue quite relevant to the current discussion. This issue involved the joint exercise of substantial market power and conscious parallelism that was allegedly exerted by Mexico’s major movie distributors. These distributors allegedly refused to sell film copies, to certain cinema operators in order to divide the market.

In this case the relevant market was defined as the distribution of American Film productions within Mexican territory. Here, all the major distributors had a very similar market share, so no one alone could be considered to hold excessive market power. However when all of the film distributors simultaneously refused to sell to the same cinema operators, the CFC presumed that the distributors were acting collusively in order to drive the cinema operators out of the downstream market. Therefore the CFC ruled that it was permissible to combine the respective market shares of the distributors when assessing their market power.

The investigation showed that the distributors engaged in different forms of distribution, especially the use of movie premiers. Among the main business reasons propounded by the distributors in defense of this conduct were the need for publicity, performance dates, product heterogeneity, uncertainty about a particular film’s success, and the costs of production. In addition, the distributors argued that it was important to take into account the opinions of the consumers and the cinema owners concerning scripts, music, direction, publicity, movie subjects and the opportunity for certain cinema operators to show the film as a premier.

Notwithstanding the numerous “legitimate” business reasons put forth by the distributors, the CFC concluded that only in the following four cases can a valid business reason exist when refusing to provide the movies. These reasons are as follows: (i) The distributor does not attain an income maximization; (ii) a reiterative breach of obligations by cinema operators related with commercial and economic

---

commitments occurs; (iii) improper use of film materials by cinema operators, causes product damages; (iv) the appropriate technology such as high quality sound and projection equipment is lacking, when there is a specific restriction from the producer or the director of the film. e.g., Star Wars, by George Lucas, requiring special projection equipment.

Following the due process required in these types of cases, the Commission finding stated that the alleged practices did not constitute a violation of the FLEC, because the distributors’ commercial policies did not amount to absolute or relative monopolistic practices as defined in Article 9, section III, and Article 10, section V, of the FLEC. More particularly, the behavior complained of did not constitute a refusal to sell to certain cinema owners nor did it create a market division. This was so, according to the CFC, for two main reasons attributable to the claimants: (i) their carelessness in accomplishing new standards of quality achieved in the new competitive environment since 1995; and (ii) their failure to meet the requirements of technology and comfort conditions that each distributor was looking for.

CRIMINAL OFFENSES AND CONSENT DECREED

Although the FLEC authorizes the CFC to report alleged criminal practices in matters of competition to the Attorney General, no such crimes are actually defined in the statute. Price fixing by competitors violates the FLEC. Moreover, if the conduct involves necessary consumption goods, the conduct may even be considered a criminal offense.27

Such was the case in the ex officio investigation initiated to determine the existence of alleged monopolistic practices engaged in by members of the National Chamber of the Industry of Production of Corn Dough and Tortillas in Baja California. The CFC claims alleged that the tortilla companies were fixing the sale price of tortillas for human consumption at $5.00 per kilogram in the cities of Mexicali and Tijuana. This was considered by the CFC to be a violation of the FLEC.28 Information about this action was disseminated through the printed media of the above-mentioned localities. In this case the CFC also filed a claim with the attorney general. The criminal proceeding followed a completely independent course. Considering the elements required to integrate the criminal offense, the final ruling of the CFC should not affect the result of the criminal proceeding. Therefore, the investigation concluded with some commitments assumed by the liable parties.

Under Article 41 of the RFLEC, there is a remedy analogous to the consent decree existing in the American legal system. Under this authority, the CFC proposed that certain commitments be made by the allegedly liable parties. These commitments require the tortilla companies to cease the anti-competitive practices which had been investigated. The defendants presented written documents to the CFC by means of which: (i). The Chamber pledged not to persuade its associates to carry out acts in violation of the FLEC and its Regulations. (ii). The industrialists of Tijuana and Mexicali, in separate documents, pledged not to carry out acts in violation of the

27. See article 253 section 1 subsection (b), (c), and (d) of the Federal Criminal Code.
28. See articles 8 and 9 of the FLEC and 5 of the RFLEC.
LANDMARK CASES IN MONOPOLISTIC PRACTICES

LFCE and its Regulations. In addition the CFC set the following conditions for their approval: 1) that the Chamber issue and deliver a circular to all its members informing them of the freedom they have to fix their prices and compete among themselves, disseminate among them the resolution of the CFC and demonstrate that it complied with the conditions established; 2) that the industrialists of Mexicali issue statements which they shall exhibit in their establishments, expressing the freedom that each one has to fix the price of tortillas and demonstrate compliance with the conditions established. This promised to restore the process of free competition in the markets for production, distribution and sale of corn tortillas in Mexicali and Tijuana.

INTERNATIONAL APPLICATION OF THE FLEC

Mexican competition legislation not only seeks to investigate, eliminate and prevent conduct which impedes the free market on Mexican soil, but the law also may be applied to conduct which originates in a foreign country. This law may be applied to foreign entities so long as the object or effect of the foreign conduct effects Mexican commerce in a direct, indirect or foreseeable manner, and causes harm to or impedes access to the free market.

In addressing the territorial scope issue, Article 1 of the FLEC provides that the legislation is enforceable throughout Mexico with regard to all economic activities. Utilizing a joint interpretation of articles 12 and 13 of the Federal Civil Code the CFC concluded that all legal acts taking place abroad are generally governed by foreign law, or, if the parties so choose, the Mexican law can be applied.

As to the effects of such acts, Mexican laws are applicable when production of the product takes place in Mexican territory.

Since the provisions of the FLEC are deemed to be in the public interest, their application cannot be waived. Thus, if foreign acts have actual effects within the national territory, these acts become subject to the FLEC.

Mexican laws, as well as many other international private laws, have used the effects of a particular act or conduct as a basis for jurisdiction. Although, the conflict rule of lex loci solutionis included in the Civil Code is not identical to the substantial effects principle provided in the FLEC, they are very similar. Both use the effects as a jurisdictional basis for the enforcement of the national law. In the case of lex loci executionis, as it is also known, the national law is enforceable if the effects of such acts are produced within the country. The FLEC does not purport to apply to marginal or minor effects. However, the FLEC is designed to protect the country's free competition process from those effects that may materially harm it. The FLEC does apply to foreseeable effects because in some specific cases (especially, vertical practices or forbidden concentrations) the attempt is sanctioned, and in almost every case the intention of the parties is taken into account.

---

29. Article 12 of the Federal Civil Code (CC) provides: Mexican laws shall govern all people located, as well as all acts occurred within Mexican territory and jurisdiction, and those expressly submitted to its provisions; except in those cases where the Mexican laws provide foreign law is applicable and when international treaties so provide it.
30. See Article 6 CC.
31. López Velarde Estrada Rogelio, La Ley Federal de Competencia Económica y algunas consideraciones
What is interesting concerning the foreign enforcement of the FLEC to acts that have effects in Mexico, is the possible conflict of the FLEC with the laws of the country where the Mexican law is sought to be enforced. The solution to this probable conflict of law can be found in one of the international private law principles, specifically, the doctrine of international comity.  

There have been three investigations initiated by the CFC, where the persons or companies agents subject to investigation as a result of their international conduct were summoned from abroad, after enough elements to prove the alleged liability were found. For this reason the CFC has required the Mexican Ministry of Interior to give directions to the nearest consul from the various legal domiciles of the alleged responsible parties.

One of the most interesting of these cases involved the filing of a complaint by American Express Travel Related Services Company, Inc. and American Express Company México, S.A. de C.V., (AMEX) against Visa International Service Association (VISA) and Visa International Mexico, S.A. de C.V. (VISA México). VISA International, a competitor, allegedly attempted to impose a statutory bylaw provision which prohibited banks operating in Mexico from issuing cards of Amex. Those who did not respect such provision would lose their VISA membership.

In order to maintain the status quo at the time the complaint was filed, the CFC, using its prevention powers, required the VISA companies to respond within three days to the aforementioned claims, further admonishing VISA that in the event that they did not respond, the allegations would be considered true.

In response to these allegations, the accused companies responded that they had not approved and did not intend to approve any bylaw provision which would prohibit foreign banks operating in Mexican territory to issue cards of Amex. Due to the response of the accused companies, the CFC terminated the investigation procedure. The VISA companies were also admonished to abstain from entering into any exclusivity contracts imposing on others the obligation to not produce or distribute goods or services for a certain period of time which could have as object or effect the displacement of other agents from the market and/or substantially impede their access thereto, such as the imposition of statutory bylaw, contractual or similar dispositions, which could pressure or invite any card issuer to operate exclusively with VISA or stop operating with other economic agents.

Another interesting issue closely related to the topic at hand involves an international cartel to fix the price of citric acids in the world market. This conduct has potentially detrimental effects for the Mexican market. This cartel was entered into by the companies Archer Daniels Midland Co., Haarman & Reimer Corporation (subsidiary of Bayer AG) F. Hoffman-La Roche Ltd. (subsidiary of Critique Belge NV) and Jungbunzlauer International AG. This particular agreement
seeks to suppress and eliminate competition between the economic agents participating in the citric acid market. The questionable conduct in this case was an agreement by the companies to fix the price of citric acid through the exchange of information. The companies also agreed to coordinate price raising for the citric acid sale and to allocate the volume available for sale in the international market.

Between 1996 and 1998, these companies plead guilty before the United States Department of Justice for participating in price fixing and for the international market segmentation of citric acid. Following the proceedings in the United States, a Mexican investigation was launched to determine the effects this cartel had in the Mexican market.

Another major international investigation by the Mexican Government focused on a cartel which sought to fix the prices of vitamins prices in the international market. Because the firms involved had subsidiaries in Mexico, this type of conduct may be deemed as an absolute monopolistic practice in violation of article 9 of the FLEC, as an agreement entered into by competitors with the intent to fix prices.

Practitioners may wonder how the enforcement of this type of ruling might be enforced, in the event that the CFC finds the investigated firms liable for violations of the FLEC, when their operations and activities are performed abroad, and their assets are located abroad.

The international issue is not contemplated by the FLEC and its regulations. However, the Federal Rules of Civil Procedure may be applicable. In order to avoid any technical legal difficulty, the CFC has to assure itself that the remedies that could be decreed, are enforceable within Mexican territory. The sanctions that could be levied consist in the order to suspend, correct or eliminate the illegal conduct or concentration according to section I of article 35 FLEC.

To that end the CFC may coordinate its procedures to fight and prevent monopolies, forbidden concentrations and illegal conducts with other government agencies. One possibility might be to coordinate its action with the Secretaria de Hacienda y Credito Publico through the customs office to restrict imports of the relevant product.

34. See article 1 of the RFLCE.
35. See article 24-II FLEC.