Competition and antitrust developments in Mexico

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The year 2011 could be considered as a point of inflection for competition policy in Mexico. First and foremost, after long discussions and negotiations at the Mexican Congress, substantial amendments to the competition legislation were approved. On the side of policy enforcers, the Federal Competition Commission (the "*FCC*") took an active position in providing transparency to its decisions and clarification of concepts used by applicable legislation; furthermore, in addition to the issuance of significant decisions by the FCC, competition laws were proactively used (probably excessively) in a conflict among the major telecom players in Mexico.

Amendments to Mexican legislation

After months of lobbying, the Mexican Congress approved the anticipated amendments to the Federal Law on Economic Competition (*Ley Federal de Competencia Económica*, the "*Competition Law*"), the Federal Criminal Code (*Código Penal Federal*) and the Federal Civil Procedures Code (*Código Federal de Procedimientos Civiles*). The amendments were published in the Official Gazette of the Federation on May 10, 2011[1] and August 30, 2011.[2]

The most significant amendments relate to monopolistic practices, merger control, the administrative procedure, fines and penalties, and class actions, as briefly described below:

Monopolistic practices

The concept of joint dominance (*poder sustancial conjunto*) has been incorporated to sanction two or more economic agents participating in relative monopolistic practices (*abuse of dominance*) in a relevant market with a negative impact on competition. It shall be noted that the amendments on joint dominance are poorly drafted and lack clarity, thus we anticipate that this concept will have to be clarified in the regulations to the Competition Law. This is a highly controversial issue which has raised significant concerns on the Mexican market and, if and when enforced, will most probably end up in extensive litigation where it is difficult to anticipate the outcome.

Merger control

The exceptions for submitting a pre-merger filing and scenarios under which a transaction may be subject to an expedite review process have been migrated from the regulations to the Competition Law, and broadened and clarified.

In terms of merger control, it is quite possible that the number of transactions that will be subject to a pre-merger filing will decrease, and consequently, the FCC will be able to devote more time and resources to analyse those transactions that may have effects in the relevant market.

Administrative procedure

Provisional remedies. The FCC has been granted with the authority to issue injunction orders with respect to those collusive arrangements or activities allegedly carried out by economic agents, subject to an administrative procedure.

Inspection visits. Limitations on the FCC's authority to carry out inspection visits have been relaxed, allowing the FCC to carry out surprise visits and to request the assistance of the police to enforce the Competition Law. It is advisable for corporations active in the Mexican market to conduct "mock" dawn raids to make sure that its personnel will know how to handle an inspection visit if necessary.

Challenge of FCC's resolutions. A new judicial procedure called "*Juicio Ordinario Administrativo*" has been established to challenge FCC's resolutions. This new procedure is subject to the enactment of specific rules and creation of specialised courts; however, this has not yet occurred even though they were supposed to be issued within the 180 days following the date in which the amendments became effective.

Fines and penalties

Fines. This is probably the most significant amendment to the law, where the fines that may be imposed by the FCC have been substantially increased up to (i) 10% of the annual revenues of the economic agent, in the case of absolute monopolistic practices (*cartels*) or breaching conditions imposed by the FCC when clearing a concentration; (ii) 8% of the annual revenues of the economic agent, in the case of relative monopolistic practices or prohibited concentrations or for breaching a stop order (in a pre-merger filing

procedure); and (iii) 5% of the annual revenues of the economic agent, for failure to submit a pre-merger filing when applicable.

Criminal penalties. The Federal Criminal Code was amended to incorporate a penalty of three to 10 years of imprisonment to the persons that carried out an absolute monopolistic practice.

Class actions

Probably one of the most significant developments in Mexican legislation for the last decade consists in the amendment of diverse laws (e.g. environmental, consumer protection, health and competition laws) to incorporate the possibility for affected parties to file class actions before the Mexican civil courts.[3] Furthermore, the Federal Civil Procedures Code was amended to include a complete chapter containing the rules for the procedure that will apply to such class actions. In this regard, these amendments will enable those parties affected by monopolistic practices and illegal concentrations to submit class actions to request the payment of damages and lost profits.

In summary, as a consequence of these amendments, the FCC was granted with extensive powers to investigate and sanction illegal activities, and affected parties were granted with a tool to demand the payment of damages and lost profits derived from illegal conducts.

Transparency

The FCC's webpage was entirely renovated to include more precise information about its structure, activities and decisions. Specifically with respect to its decisions, the FCC's spent a lot of resources in developing a complete and accurate "resolutions browser" that has resulted in a fantastic tool for searching FCC's precedents.

Furthermore, on March 2011, the FCC published the following documents to provide more certainty and guidance to economic agents and competition practitioners:

a) Guidelines for the Notification of Concentrations, which is an extensive and theoretical document, describing the merger review process.
b) Assessments of (i) Market Power in Competition Matters, and (ii) Relevant Market in Competition Matters,[4] which were prepared upon the request

of the FCC (sponsored by USAID) for the purposes of describing best international practices, international cases and investigations, and the current and prevailing technical approaches used in the analysis and assessment of market power and market definition.

c) Guidelines on the compliance of the Competition Law by Associations, Commercial Chambers and Groups of Professionals.

d) Draft Guidelines on the Technical Criteria for the Imposition of Fines on Economic Competition Related Matters.

FCC's activities and cases

In 2011, the FCC imposed the highest fine in Mexican competition history to Telcel (a mobile phone provider and affiliate of Telmex) in the amount of Mex$11,989m pesos (approximately US$1bn at the exchange rate on the date in which it was imposed), for considering that Telcel incurred in illegal abuse of dominance practices. For obvious reasons, such a fine is still subject to appeal by Telcel and it is not expected that this litigation will be resolved in the short term.

Furthermore the FCC determined that (i) Telmex has a dominant position in the market of end-up calls in fixed telephone network (*mercado de terminación de llamadas en redes fijas de telefonía*); and (ii) diverse mobile phone providers (Telcel, Telefónica and Iusacell) have a dominant position (within their own network) in the market of end-up calls in mobile telephone network (*mercado de terminación de llamadas en redes de telefonía móvil*). All these cases are still in litigation.

Likewise, the FCC determined to close an investigation for potential absolute monopolistic practices in the optical disc drives market.

On the merger control side, during 2011 110 pre-merger filings were submitted before the FCC, which represent approximately 20% more cases than those analysed during 2010. Statistical information on such cases has not yet been released by the FCC. Within the most relevant concentrations analysed by the FCC during 2011 are the acquisition by Regal Beloit of the Electrical Products Company of A.O. Smith Corporation, the acquisition by FedEx of the Multipack business of Grupo ADO, the merger of AMB Property Corporation and ProLogis, and the merger of Nalco Holding Company and Ecolab, Inc.

Conclusions

In conclusion, competition in Mexico has become a relevant topic on the internal affairs agenda. The FCC's decisions and actions have been and will continue to be under the spotlight; thus the success of the amendments in strengthening economic competition in Mexico will depend on the FCC's ability to enforce them and on the scrutiny of the Courts.

We believe that enhancing competition in Mexico is probably the most critical aspect to achieving the sustained economic growth that our country needs.

Notes:

[1] The amendments became effective on May 11, 2011.

[2] The amendments published on this date concern to class actions, and will become effective within the six months following their publication in the Official Gazette of the Federation.

[3] Pursuant to the Federal Civil Procedures Code, the FCC will also be empowered to initiate class actions.

[4] This document was prepared by Howard H. Chang, David S. Evans, and Richard Schmalensee.

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