

Dominance

The regulation of dominant firm conduct
in 35 jurisdictions worldwide

2011

Consulting editors: Thomas Janssens and Thomas Wessely



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Mexico

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General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

Article 28 of the Mexican Constitution prohibits monopolies and monopolistic practices. This constitutional mandate is implemented by the Federal Law of Economic Competition (LFCE) which provides regulation on merger control, absolute monopolistic practices and relative monopolistic practices. The LFCE defines four specific types of conduct that constitute absolute monopolistic practices, all of them consisting of collusive agreements (price fixing, restriction of output, market segmentation and bid rigging) and being illegal per se. Additionally, the LFCE defines 11 specific types of conduct which are considered as relative monopolistic practices, referred to as unilateral exclusionary or predatory conduct performed by economic agents having substantial market power in the relevant market. Provisions on relative monopolistic practices are the ones specifically applying to the behaviour of dominant firms.

The LFCE does not use the term 'dominance'. Its equivalent term is 'substantial market power' which may be defined as the capacity to unilaterally fix prices or restrict the supply to the relevant market without competitors being actually or potentially capable of counteracting such capacity. Thus, dominant firms are referred to in this document as economic agents having substantial market power.

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

Issues regarding the acquisition or strengthening of substantial market power are specifically addressed in merger control provisions. However, relative monopolistic practices provisions might indirectly cover conduct through which a non-dominant company becomes or attempts to become dominant, when a monopolist firm in certain relevant market unlawfully uses its power to monopolise other markets. In any case, the conduct would be covered by the LFCE only if it is performed in connection with goods or services pertaining to the relevant market where the defendant enjoys substantial market power.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

Article 2 of the LFCE expressly states that its object is 'to protect the competition process and free access to the markets, through the prevention and elimination of monopolies, monopolistic practices and other restrictions to the efficient operation of goods and services markets'. The underlying standard of the legislation is also strictly economic.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

There are no rules applying to unilateral conduct performed by non-dominant firms.

5 Sector-specific control

Is dominance regulated according to sector?

Relative monopolistic practices, which comprehend abuse of dominance as well as vertical restraints, are investigated and sanctioned by the Federal Competition Commission (CFC or Competition Commission) under the LFCE which applies to all sectors equally.

Additionally, certain sector-specific legislation empowers the corresponding agency to establish economic regulation (tariffs, standards of quality or information obligations) when it is determined that a firm has substantial market power or effective competition does not exist in a particular market. These situations must be previously declared by the CFC under a specific procedure, hereinafter referred to as the 'dominance procedure'. Some sector-specific provisions providing this kind of economic regulation are article 63 of the Federal Law of Telecommunications, article 174 of the Railroad Service Regulations, articles 68 and 70 of the Airports Law and article 12 of the Natural Gas Regulations.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

The relationship between the sector-specific provisions and the LFCE (which is the general abuse of dominance legislation) is complementary.

Sector-specific provisions empower the corresponding sector agencies to impose specific economic regulation to the dominant firm or to participants in the market, while the existence of a dominant firm or the absence of effective competition must be previously declared by the Competition Commission according to the 'dominance procedure' regulated in the LFCE in order for the sector agencies to exercise their power.

Economic regulation imposed under sector-specific provisions constitutes a preventive mechanism, while relative monopolistic practices provisions contained in the LFCE are aimed at investigation and sanction of abuse of dominance conduct. Moreover, a dominant firm who has performed a relative monopolistic practice may be sanctioned by the Competition Commission regardless of whether it is subject to sector-specific regulation.

7 Enforcement record

How frequently is the legislation used in practice?

Since the LFCE came into force in 1993, it has been frequently used in practice although the CFC's action and effectiveness on its roll of investigating and sanctioning abuse of dominance conduct has been decreasing in recent years.

According to the CFC's annual reports, between 2006 and 2008, the Competition Commission imposed five sanctions for relative monopolistic practices versus seven sanctions imposed in the preceding three-year period (2003 to 2005).

According to other sources, from January to November 2009, the CFC concluded only three proceedings aimed at investigating and sanctioning relative monopolistic practices, imposing a fine in just one of the cases. From November 2009 to November 2010, the CFC has concluded three proceedings and has not imposed any fines.

8 Economics

What is the role of economics in the application of the dominance provisions?

Economic analysis plays a major role in cases involving dominance since a delimitation of the relevant market and the analysis of substantial market power must be carried out to support the Competition Commission's resolutions. Economic expert witnesses are frequently used in proceedings before courts and less frequently before the CFC.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

Pursuant to article 3 of the LFCE, dominance provisions apply to any person engaged in any economic activity, including government entities expressly.

In this regard, it is worth mentioning that article 28 of the Constitution prohibits monopolies and monopolistic practices. This constitutional provision also states that certain economic activities which are performed by the state under exclusive basis, such as postal services, telegraphs, oil, basic petrochemicals and electricity are not considered as monopolies. Although this exemption is reproduced by article 4 of the LFCE, the same article establishes that the state entities responsible for the aforementioned activities are subject to the LFCE regarding 'the acts not expressly comprehended' in the constitutional provision. In our opinion, the wording of article 4 of the LFCE is inaccurate and should be interpreted in the sense that the state entities are allowed to possess a monopoly but not to abuse the power derived from such circumstance, since the scope of the exemption does not cover the explicit constitutional prohibition of monopolistic practices.

10 Definition of dominance

How is dominance defined?

As mentioned in question 1, 'substantial market power' is the equivalent concept of dominance under Mexican law. The LFCE does not explicitly define substantial market power but enunciates the elements to be analysed in order to determine if an economic agent enjoys such a power (market share, entry barriers, etc). One of these elements is 'the capacity to unilaterally fix prices or substantially restrict the supply to the relevant market without competing agents being actually or potentially capable of counteracting such capacity', which is, in fact, the definition of substantial market power.

11 Market definition

What is the test for market definition?

The test for market definition is the same for all procedures regulated in the LFCE (dominance procedures, relative monopolistic practices investigations and merger control procedures). Article 12 of the LFCE establishes the elements to be analysed in order to define a relevant market. In general terms, the definition of a relevant market must include the product or service and its close substitutes, as well as the geographical area where said product or service is offered or demanded.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

There is not a market-share threshold above which a company is presumed to be dominant. The analysis to conclude whether or not an economic agent has substantial market power must be made on a case-by-case basis. The most important elements to be analysed in order to assert that an economic agent holds substantial market power are:

- the market share of the economic agent subject to analysis and how it compares with its competitors' market share;
- the existence of entry barriers and the factors that may alter those barriers; and
- the access to input sources.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

This concept is not covered by the LFCE.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

The LFCE applies to both purchasers and suppliers with no differences. However, legal actions against abuse of dominance conduct performed by purchasers have been rare in practice. Moreover, there are some types of conduct that, by their nature, can only be performed by suppliers, such as refusal to deal, predatory pricing and cross-subsidies.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

The term abuse is not defined by the LFCE. This notwithstanding, several types of conduct considered abusive under other jurisdictions may constitute relative monopolistic practices under Mexican law, as shown in questions 19 to 31. Article 10 of the LFCE defines 11 specific relative monopolistic practices. Mexican law follows an effects-based approach to identifying anti-competitive conduct since relative monopolistic practices may be deemed illegal only if: the conduct is performed by an economic agent possessing substantial market power; and the conduct's purpose or effect is to unduly displace other economic agents from the market or to substantially preclude their access to the market or to create exclusive advantages in favour of one or several persons. Additionally, efficiency gains (ie, net contribution to a consumer's welfare overcomes the anti-competitive effects of conduct) may be alleged to sustain the legality of a relative monopolistic practice as explained in question 18.

Unilateral conduct is never prohibited per se under Mexican law. Only horizontal restraints or collusive agreements (absolute monopolistic practices) are prohibited per se and shall always be null and void regardless their effect on the market.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Only predatory and exclusionary unilateral conduct falling into a specific relative monopolistic practice definition is covered under the LFCE (see question 15). A dominant firm does not violate the LFCE simply by exploiting its power and charging monopolistic prices.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

In order for a relative monopolistic practice to be illegal, the conduct in question must be performed in connection with goods or services pertaining to the relevant market where the defendant possesses substantial market power. This notwithstanding, the displacement of other economic agents (which is also a condition for the practice to be deemed illegal) may occur with respect to a different but related market.

18 Defences

What defences may be raised to allegations of abuse of dominance?
Is it possible to invoke efficiency gains?

The main defences usually raised to an allegation that certain conduct constitutes a relative monopolistic practice are:

- an inaccurate definition of the relevant market due to the existence of close substitutes of the product or service in question;
- the absence of entry barriers and, therefore, the lack of substantial market power; and
- that the conduct generates efficiency gains so that net contribution to consumers' welfare overcomes its anti-competitive effects.

Specific forms of abuse

19 Price and non-price discrimination

This conduct is explicitly covered by article 10, section X, of the LFCE. According to this provision, the imposition of dissimilar selling or buying prices or conditions to buyers or sellers situated in equal conditions is a relative monopolistic practice. Thus, price and non-price discrimination, as well as conduct referred to in questions below falling into the relative monopolistic practice concept, will be deemed illegal only if:

- the conduct is performed by an economic agent possessing substantial market power;
- the conduct's purpose or effect is to unduly displace other economic agents from the market or to substantially preclude their access to the market or to create exclusive advantages in favour of one or several persons; and
- the net contribution to consumers' welfare does not overcome the anti-competitive effects of the conduct.

20 Exploitative prices or terms of supply

These practices are not covered by Mexican competition law. Unilateral illegal conduct is always predatory or exclusionary.

21 Rebate schemes

This type of conduct is covered by article 10, section VIII, of the LFCE. According to this provision, the granting of discounts or incentives

with the requirement of not using, acquiring, selling, marketing or providing the goods or services produced, processed, distributed or marketed by a third party is a relative monopolistic practice.

In 2004 Miller filed a complaint before the CFC against brewing companies Modelo and Femsa, alleging preclusion of access to the beer sales market (through small stores channels) due to economic incentives granted by the defendants in exchange of exclusive dealing. In 2006, after a reconsideration appeal filed by Modelo, the CFC determined that there was no liability, revoking its first decision. In 2007 the CFC decided Femsa was not liable either.

22 Predatory pricing

This conduct is specifically defined as a relative monopolistic practice by article 10, section VII, of the LFCE. Under this provision, there is predatory pricing when there is a systematic sale of goods or services at prices below their average total cost or when an occasional sale at prices below average variable cost takes place and it can be presumed that the losses will be recouped through future price increments.

The most important case related to this type of conduct took place in the chewing gum sales market. Cannel's sued Warner Lambert for predatory pricing, sustaining that the conduct was covered by section VII of article 10, then in force, which contained a general provision stating that any action unduly harming competition process was considered as a relative monopolistic practice. The CFC found liability, but the Supreme Court declared section VII as an unconstitutional provision, since it lacked the specifics of the prohibited conduct, and forced the CFC to revoke its decision. In June 2006 several amendments were made to the LFCE, one of them consisting of replacing said general provision with five specific relative monopolistic practices (then defined in the LFCE Regulations). As a result, the former content of section VII was replaced with the definition of predatory pricing and sections VIII to XI were added in order to include the definitions of loyalty rebates, cross subsidies, price discrimination and rising rival's costs.

23 Price squeezes

Price squeezes may be sanctioned under article 10, section XI, of the LFCE, since according to this provision any action performed by one or more undertakings with the purpose or effect of increasing rivals' costs or hindering rivals' productive processes or reducing the demand accruing to them is a relative monopolistic practice.

In September 2009 the CFC concluded the investigation period of a proceeding against Telcel (the largest mobile telecommunications provider), issuing a preliminary decision stating that said operator is liable under section XI for charging its competitors higher rates for call termination services than the ones offered to its final customers for the mobile telephony service.

24 Refusals to deal and access to essential facilities

Refusal to deal is explicitly covered by article 10, section V of the LFCE. Under this provision, refusing to sell, market or provide to certain persons, goods or services that are usually offered to third parties is a relative monopolistic practice.

Refusing to provide a competitor with access to an essential facility might be challenged under section V of article 10 if access to such facility is usually provided to other parties.

Access to essential facilities is commonly regulated in sector-specific laws (eg, the Federal Telecommunications Law obliges all operators to interconnect their networks to each other's networks).

In November 2009, the CFC fined Televisa for refusing to sell broadcasting signals to competitors in the pay-television market. The CFC highlighted that some of Televisa's broadcasting signals are an essential good for other pay-television providers since they enjoy substantially higher ratings than any other broadcasting signal.

25 Exclusive dealing, non-compete provisions and single branding

According to article 10, section IV of the LFCE, the sale, purchase, or transaction subject to the condition of not using, acquiring, selling, marketing or providing the goods or services produced, processed, distributed or marketed by a third party is a relative monopolistic practice.

In 2005 the Competition Commission fined some Coca-Cola distributors for denying the supply of Coca-Cola products to customers refusing to accept the condition of not selling Big Cola products.

26 Tying and leveraging

According to article 10, section III of the LFCE, the sale or a transaction subject to buy, acquire, sell or provide another different or distinguishable good or service is a relative monopolistic practice.

27 Limiting production, markets or technical development

Since the LFCE does not cover unilateral exploitative practices, it is legal for a dominant firm to maximise its profits by limiting production, markets or technical development.

28 Abuse of intellectual property rights

According to article 28 of the Constitution, copyrights and patents are not considered as monopolies. Although this exemption is reproduced by article 5 of the LFCE, article 5 establishes that copyright and patent holders are subject to the LFCE regarding the acts not expressly comprehended in the constitutional protection. Thus, conduct involving abuse of intellectual property rights may constitute relative monopolistic practices and be illegal.

In *Televisa*, referred to in question 24, the CFC stated that the exclusive right to exploit a product shall not be considered as a monopoly or as a monopolistic practice; however, such a right does not authorise its holder to discriminate or to refuse to deal, particularly when the product is usually offered to third parties, as it happened with Televisa's broadcasting signals.

29 Abuse of government process

This type of conduct may be covered by article 10, section XI of the LFCE, which establishes that any action increasing rivals' costs or to hinder rivals' productive processes is a relative monopolistic practice.

In July 2002, the CFC fined several gas companies for obstructing the construction of a competitor's storage facility. The obstruction consisted, among other actions, of filing motions before courts to obtain orders suspending a 'dangerous' construction without any legal basis. This decision was taken under the general provision formerly contained in article 10, section VII of the LFCE (before the Supreme Court declared the unconstitutionality of said provision) and under the specific definition then provided by article 7, section V of the LFCE Regulations, and later incorporated in article 10, section XI of the LFCE (see question 22).

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

Structural abuses do not fall within the relative monopolistic practices concept, but may be prevented or challenged by means of the LFCE's merger control provisions.

31 Other types of abuse

Besides the ones explained in questions 19 to 30, the following types of conduct are defined in article 10 of the LFCE as relative

monopolistic practices (although some of them are not characterised by other jurisdictions as abuse of dominance practices but as vertical restraints): resale price maintenance, cross-subsidies, boycotts and vertical market segmentation.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

Monopolistic practices are explicitly prohibited by article 28 of the Constitution and article 8 of the LFCE. When abusive conduct constitutes an illegal relative monopolistic practice, the CFC is empowered to impose fines and to order the involved parties to stop the conduct once the corresponding proceeding before the CFC has been concluded. This notwithstanding, the CFC's decisions may be challenged by the affected parties before federal courts.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

The authority responsible for the enforcement of the LFCE is the CFC, which has various investigatory powers such as requesting documents and information, compelling testimony and performing verification visits in any domicile of the persons under investigation.

34 Sanctions and remedies

What sanctions and remedies may they impose?

The CFC is empowered to impose fines (based on minimum wages) and remedies as a result of an investigation of abuse of dominance conduct:

- ordering a firm to cease the illegal practice;
- imposing a fine of up to approximately US\$3.7 million on the firm involved in the illegal conduct;
- imposing a fine of up to approximately US\$124,000 on the individuals engaging in the illegal conduct, acting on behalf of legal entities; and
- imposing a fine of up to approximately US\$116,000 on the firms or individuals who have cooperated with the infringing party.

In cases of recidivism, the CFC may impose a fine:

- up to twice the applicable amount;
- up to the equivalent of 10 per cent of annual sales of the infringing party during the preceding fiscal year; or
- up to the equivalent of 10 per cent of the value of the infringing party's assets, whichever amount is higher.

As a structural remedy, the CFC is empowered to order the divestiture or sale of assets, rights, ownership interests or stock in the portion as may be required for the economic agent to cease to have substantial power in the relevant market. This remedy may be imposed only if the infringing party has been sanctioned at least twice.

The highest fine in an abuse of dominance case is the one imposed on Televisa on 20 November 2009 by the CFC for 47,513,600 Mexican pesos.

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

There are no direct consequences for the validity of contracts entered into by dominant companies. However, since the CFC is empowered to impose the correction or cessation of a relative monopolistic

practice as a sanction, a resolution stating that this kind of illegal conduct has taken place could result in elimination or modifications to some terms of contracts.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

Article 32 of the LFCE entitles affected parties to file a complaint when relative monopolistic practices are being performed. The complainant shall include the elements that constitute those practices and the concepts that prove that the complainant has suffered or may suffer damage or loss.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

While the CFC cannot award monetary damages, a party who has been harmed by a monopolistic practice or undue concentration may file a civil action for damages in court, once the administrative infringement proceeding has been concluded.

Civil liability may result from an antitrust violation by means of an ordinary trial for damage and loss, filed by any economic agent affected by such violation once the CFC resolved the administrative procedure and said resolution is not appealed. Only judicial authorities can adjudicate on such claims. For these effects, such authorities may request an estimation of the damages from the CFC, although such a request is not mandatory.

38 Recent enforcement action

What is the most recent high-profile dominance case?

Besides the above-mentioned *Televisa* case, the CFC has decided four high-profile cases through the dominance procedure described in

Update and trends

The LFCE was last amended in June 2006. Since then, a number of bills have been introduced before Congress. Some of these proposals have been debated, and in April 2010 the Chamber of Deputies approved and sent to the Senate a bill containing several proposals that are intended to:

- substantially increase the level of fines for monopolistic practices;
- incorporate the concept of joint substantial market power; and
- provide the CFC with more powers.

On 9 December 2010 the bill was modified by the Senate and returned to the Chamber of Deputies for further discussion.

question 5 during 2009, stating that Telmex has substantial market power in the following relevant markets:

- lease services of long-distance or local dedicated transmission lines or circuits;
- services of local transit of voice traffic through a telecommunications public network that provides fixed local service;
- origination of voice calls; and
- termination of voice calls.

Under these Competition Commission decisions, the Federal Telecommunications Commission may require Telmex to adhere specific regulations on tariffs, quality of service and provide information.

In September 2009 the CFC issued a preliminary resolution, stating that Telcel has carried out a relative monopolistic practice in the market of call termination services.



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