

**American Bar Association Post Annual Meeting
Antitrust Section**

Panel with NAFTA Neighbors Questions & Answers¹

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Enforcers:

Melanie Aiken (Commissioner of Canada
Competition Bureau)
Miguel Flores Bernés (Commissioner of
Federal Competition Commission of Mexico)

Questioner:

Roxann Henry (Moderator)

RH: We understand that the competition law in Mexico may be changing. Can you please explain what is being proposed and the status?

MFB: Please allow me to give you a brief context regarding the evolution of Mexican Competition Law, before I refer to the latest changes that have been proposed to Congress this year.

Our Competition Law is relatively new; it entered into force in 1993, and was amended in 2006. The Law was designed using what were the best international practices known at the time, and is mostly based in US jurisprudence; although there is also some other influences, since we do not have a private enforcement system like the US, and therefore the procedural burden is carried out by the Federal Competition Commission (which I'll refer from now on as to "the Commission").

In 2006, the Law was amended to include some relevant changes in order to comply with constitutional concerns -regarding the scope and coverage of some of the conducts contained in the statute- as well as to try to bring up to date some provision in relation to international standards.

Some of the changes included:

- Upgrading of the administrative sanctions, which were too low in accordance to international standards;
- Reduction of administrative burdens in the merger notification process;
- The creation of a leniency program and of a special procedure for the settlement of

¹ These notes were taken by Miguel Flores Bernés; the notes and opinions expressed here are my own responsibility and do not reflect the opinion of the *Comisión Federal de Competencia*

investigation procedures regarding abuse of market power.

These changes provided new tools and improvements in the application of competition law in Mexico; however some questions and practical problems emerged.

Upon the enactment of the Law, the Attorney General's Office initiated a procedure to declare the unconstitutionality of some of the provisions that were related to the relationship between the Executive, Congress and the Judiciary. The Supreme Court of Justice declared unconstitutional the procedure for the appointment of Commissioners (no objection by the Senate House), the need of require a court order to perform administrative on-site visits and to apply certain administrative sanctions (break up of an enterprise), and the obligation to present an annual report to Congress.

So the Attorney General won the battle, but Congress -particularly the Senate House- was not amused, thus a possible payback is foreseeable.

Practical procedural issues also arose. For example, currently the Commission is unable to perform surprise on-site searches to recover evidence and documents. These documents have been requested beforehand and prior notice must be delivered to a firm before the visit to its premises can take place.

Also the Commission has no power to provide -or ask a court to provide for- a preventive injunction to require a party to refrain from a conduct that could be possible abuse of dominance and cause serious harm to competition.

Likewise, the new process to settle -with parties- the end of investigations has not been very popular among antitrust lawyers; and the application of the leniency program to individuals is mostly based on the Commission's own administrative practice, but is not explicitly provided by the statute.

With regards to regulatory procedures, the current merger notifications process could be further streamlined.

More importantantly, sanctions continue to be low in accordance to international standards, so administrative sanctions should be upgraded and -in my personal opinion- there is a clear need to criminalize collusive behavior, at least "hard core cartels" should be a criminal offense to create real deterrents for antitrust offenses.

With regard to the institutional setting, I believe there is a need to improve transparency related to the work of the Commission and create balances between the President of the Commission's powers and those conferred to the other Commissioners, as well as have a more clear division of duties between Commissioners and the staff in charge of the investigations (Executive Secretary). Another concern has been the improvement of court rulings that review the Commission's decisions.

Last April, President Felipe Calderon proposed to Congress amendments to the Competition Law, and he's bill addressed the issues referred before. It was approved only 4 weeks later by the Chamber of Deputies, with a surprising overwhelming majority of 386 votes in favor (even

prominent members of opposition parties voted in favor) and only 15 against. President Calderon's proposal was slightly changed and supplemented by the Deputies and a balanced bill was the result of discussion.

The new features are:

-The upgrading of economic sanctions. For collusive behavior a penalty of 10% of annual income is provided; and for abuse of a dominance position an amount up to 8% of annual income could be imposed. In addition, for collusive behavior a penalty from 3 to 10 years of prison could be imposed.

- The Commission's Plenum would be able to authorize surprise on-site searches and grant preventive injunctions (in case of serious harm to competition), at the request of the Executive Secretary (who is in charge of the staff that performs investigations).

-There would be a clarification -in the statute- that the leniency program also applies to individuals.

-The process to settle with the Commission an abuse of dominance investigation would be improved.

-The requirements in the merger notification procedures would be reduced (for example, there won't be need to notify a corporate restructuring).

-Transparency would also be enhanced, since all technical criteria -regarding merger analysis, calculation of administrative fines, definition of relevant market and substantial market power, preventive injunction procedures, initiation of criminal procedures, among other issues- would need to be developed and published; and, every 5 years the Commission would have to present a public report on how its work has increased consumers welfare in Mexico;

-On institutional matters, the Executive Secretary would be appointed by all Commissioners - not only by the President of the Commission- (balance of powers); oral hearings before the Plenum would be introduced with a new obligation for the Commissioners to provide a written vote in all the cases that they will resolve; and, a new and specialized court room would be created in the existent Administrative and Tax Federal Tribunal.

-Last but not least, the bill includes a definition of a new "joint dominance" or "joint substantial market power" concept.

The bill -as was approved- by the Chamber of Deputies was presented to the Senate, which could analyze and vote it next September.

However, highly influential Senators of the opposition party PRI (which ruled Mexico for 75 years) have opposed to the changes and have presented a different proposal that does not include surprise on-site searches and the possibility of preventive injunctions; and provides for a more complicated method of calculation of administrative fines, among other -in my opinion- setbacks for the evolution of Antitrust Law in Mexico. Another proposal has been presented as

well by the representatives of the PRD (another opposition party).

If the bill passed by the Chamber of Deputies is approved by the Senate we could have a good improvement in our law, particularly on issues related to procedures and sanctions. More instruments would be available to perform investigations; and, although the “joint dominance” definition promises some headaches in practice, the amendments -as a whole- seems to go in the right direction.

However, we will have to wait for the discussion in the Senate to know the end of this story.

RH: In the area of mergers do you find that your staffs tend to coordinate with each other and/or with the US? How does cooperation occur, -- in writing or over the phone, -- directly with the agency or through questions to counsel for the parties? What do you see as the positive and negative aspects of the cooperation?

MFB: My knowledge about this issue is that, basically, cooperation occurs in two cases.

The first would be when a merger that will have international implications is notified to the Commission, or at least when the companies of both countries are involved; or, the merger would have effects in both countries.

Our staff notifies the merger procedures to U.S. or Canadian Authorities, and if necessary a conference call with counterparts is scheduled. Only public information is exchanged, and if more information is needed, a waiver from the companies involved in the merger would be required, although this seldom happens.

The second case, and most common, is when our merger staff is looking for technical assistance in the analysis of a specific case where U.S. or Canadian authorities have developed some expertise. This cooperation is quite useful, and of course is simpler and more expeditious (normally is made by email or phone). Usually, it is related to previous cases that have been resolved already by the other authorities and the information is public.

Regarding the positive and negative aspects of the cooperation, I would say that, in my impression, there are no negative aspects. U.S. and Canadian authorities are very generous and they are always eager to cooperate and to support our merger staff. They have a lot of experience and that’s always helpful.

Cooperation has its limits, though. I believe that this is natural since there is much information that all authorities have the obligation to keep confidential.

Nevertheless, there are some issues that could be dealt by legal counsel. For example, I would recommend lawyers dealing with mergers that could have effects in Mexico to work with our merger staff as soon as possible in the notification process to avoid delays or procedural

incompatibilities.

We have seen that some international firms leave the notification in Mexico to the last minute and that creates problems; likewise, we have seen troubles related to the drafting of non-competition clauses that are designed for other markets, and in some cases we have struggle on how to proceed when effects in Mexico rely on conditions that would be imposed by other authorities, but negotiations of such conditions are still in process.

So again my recommendation is to approach our staff as soon as possible. They are very experienced and have been working with international mergers for more than 14 years.

RH: Extradition is a hot topic after the Ian Norris trial in the United States. What do you consider the likelihood that your country would extradite someone to the United States for criminal prosecution under the antitrust laws? Would your answer be different if the extradition were for a prosecution related to consumer protection fraud?

MFB: This is an excellent question and one that has made me realize how much work we need to do in order to reach a better cooperation between the US, Mexico and Canada and to find a more common ground in the fight against international cartels.

Mexico and the US have an Extradition Treaty that clearly refers to the possibility of extradition with regards to “monopoly” crimes. However the treaty is quite old and our Criminal Code has evolved -but not in a good manner- concerning the descriptions of conducts that would be consider a crime in Mexico and that are related to antitrust matters. That is why article 253 of our Federal Criminal Code has to be revised and improved; and, why the amendments made by the Chamber of Deputies are so important.

Article 253 is quite complex. In 2007, I had the pleasure to work with a prominent criminal lawyer, Mr. Cruz Torrero, in an analysis of what we had to do to improve our criminal law in order to deter conduct against competition. We concluded that the current wording contained in our criminal code is so bad that it would be very difficult to successfully prosecute someone in Mexico for that crime, since the description of the criminal conduct is not accurate at all.

So I’m afraid that if we were correct on our analysis, Extradition Procedures would be somehow out of the question, since there would be a need to provide the basic elements of the crime and that would cause an endless discussion in Mexican courts.

Finally, I do not believe it would change much if a conduct is defined as consumer fraud.

RH: Can you give some examples of recent significant decisions in your jurisdiction?

MFB:

- In June 2010, the Commission imposed a fine to five land transportation firms and their directors due to a price fixing arrangement consistent on the agreement to impose a

Diesel “Fuel Surcharge” rate. The enterprises were members of the biggest land transportation association in Mexico (CANACAR). The global fine imposed was around 2.4 million US dollars.

- In June 2010, the Commission confirmed fines imposed to several companies and individuals, all of them shareholders of PCTV Corporation (an association of cable TV companies that buys TV signals from companies like Disney, HBO, etc). The members of the association refused to re-sell the TV signals to competitors. The fine imposed was around 530,000 US dollars. Some issues related to the case were “Single entity” considerations to resolve the existence of a collusive agreement; and, cooperation between companies to change by-laws and adjust their conduct to the law.
- In June 2010, the Commission confirmed fines imposed to several pharmaceutical firms (all of them around 12.5 million US dollars) involved in bid rigging practices in the public health sector. They were conspiring not to compete in bids to buy insulin and other medical products. Issues analyzed included the use of economic evidence to probe an “agreement” between competitors, and the legality of circumstantial evidence.
- In 2009, the Commission confirmed fines imposed to real-state agencies and real-state agents (around 2 million US dollars) that agree to fix the price of commissions charged for the selling and buying of real state in the State of Jalisco (“Lago de Chapala”). Issues included the analysis of “Multiple Listing Services”.
- In 2010, the Commission confirmed the fine imposed to “Grupo Televisa” (around 1 million US dollars), for refusing to deal and provide its TV signals to a cable competitor of one of its subsidiaries. Issues include the analysis of possible conflicts between intellectual property rights and competition law.