

Chilling Effects of Competition Laws; Are The Laws Enhancing Competition?

The case of Mexico

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This document reflects my personal opinion

The Federal Competition Commission

- Created in 1993
- Agency of the Ministry of Economy with technical and operational autonomy
- Responsible for the implementation of the Federal Law of Economic Competition (FLEC).
- Protect the process of competition preventing and sanctioning monopolistic conduct and other restrictions to market efficiency, in order to contribute to societal welfare.
- Five commissioners (10 years terms) one of whom is the Chair, all appointed by the President.

The Federal Competition Commission

The CFC's main activities include:

- Investigation and prosecution of conducts related **to collusive agreements and abuse of dominance -unilateral conduct-** prohibited by the FLEC.
- Approval of **mergers and acquisitions** that must be notified to the CFC.
- Authorization of firms interested to participate in privatizations and public tenders for the granting of concessions and permits in regulated sectors.
- Competition advocacy.

Overview of CFC investigations

Investigations started by the CFC

Period, yrs./ # of Practices	Cartel	Unilateral conduct	Total
2000-2004	47	159	206
2005-2009	52	58	110
Total	99	217	316

Source: Calculated according to publications in Federation Official Gazette

Most investigated conducts 2000-2010

2000-2004

- 29 of those 49 investigations on cartels concerned price fixing
- 41 cases were related to raising rivals' cost and 28 to refusal to deal.

2005-2009

- 22 of the 52 of investigations of cartels concerned price fixing;
- 14 addressed refusal to deal and 6 cases raising rivals' cost.

•For the whole ten-year period, price fixing concerned 52% of total cartel cases, whilst raising rival's costs represented 22% and refusals to deal 19% of all the unilateral conducts related to vertical restrains;

Cartels

Chilling effects

- As in other countries, the statute has determine that price-fixing and other agreements amongst competitors (market allocation, bid rigging and output restrictions) are *per se* offenses.
- Therefore, if any, **Type 1 errors, (over enforcement of competition law that would chill supreme efficiency competition)** are handled through a public policy decision established in the statute.
- There are no exemptions for this policy, which can cause some problems (Airline antitrust exemptions in the US, not valid in Mexico)

Unilateral Conduct

Mexico and Dominant Firms

Sectors with dominant or at least very high concentration

- Telecommunications (4 participants in mobile phones, one dominant firm in fix telephony)
- TV (2 networks)
- Transport: Air transport (2), Railroads (2)
- Construction (high concentration in cement)
- Beverages (dominant firm in soft drinks)
- Corn flour important in Mexico –Tortillas-(highly concentrated)
- Production and distribution of Bread (highly concentrated)
- Discount department stores (highly concentrated)

Unilateral Conduct

Mexican history and market structure

- Most of these sectors were previously state monopolies (railroads, telecommunications, air transport)
- Other have been subject of subsidies or tariffs/Trade Barriers Protection, or other type of governmental protection (cement, TV, corn flour)
- Others might have grown out of efficiency (discount department stores, bread), but compete in highly concentrated markets
- Likely practice of abuse comes from history and structure of markets

Unilateral conduct

Chilling effects

However, **the Mexican statute does not reflect a particularly apprehension against unilateral conduct.**

- Is a compilation of US jurisprudence
- Sets standards to define the relevant market and substantial market power (no specific % of market share is defined as in other emerging market economies)
- Embraces rule of reason analysis
- It is mandatory to take into account efficiency gains to determine possible sanction
- Has followed -since 2006- a consumer welfare standard
- **This helps as a deterrent for Type 1 errors**

Unilateral conduct

Chilling effects

- In my opinion, we have a highly sophisticated system administered by a small agency (126 people).

Country	Staff
United States	1/275 thousand inhabitants
Canada	1/114 thousand inhabitants
Argentina	1/524 thousand inhabitants
Mexico	1/820 thousand inhabitants

Unilateral conduct

Chilling effects

- Preparing an abuse of dominance case is time and resource consuming (almost 2 years).
- CFC faces highly sophisticated enterprises with worldwide presence like CEMEX, America Movil, Televisa, Maseca, Coca-Cola (FEMSA) as well as multinational companies from other countries, and State owned monopolies PEMEX, CFE, etc.

Unilateral conduct

Chilling effects

- Economic evidence is in the hands of dominant firms (difficult to obtain).
- No real incentives to settle.
- Class actions have been approved in Congress but are not in force.
- There is no record of recovery of damages before courts.

Unilateral conduct

Chilling effects

- Over-enforcement does not seem to be a problem in this area; there is more probability of **Type 2 errors (false acquittals) or even no application of the law at all.**
- Judicial culture has been extremely focused on procedure, any mistakes are strongly litigated in court and judges have been -in the past- inclined to favor firms, however after 17 years this has been slowly changing.
- From 1993 through 2009, the CFC has imposed 136 penalties for unilateral conduct derived from 37 cases. Only 16 (12%) of them have been confirmed by the courts.

Imposed			Held in Court		
Number of cases	Penalties	Ammount (dollars)	Number of Penalties	%	Ammount (dollars)
37	136	\$ 75,377,163.27	16	12%	\$ 5,262,588.05

Unilateral conduct

Chilling effects

- CFC has to strictly follow procedures established in the statute to determine relevant market and substantial market power (recently courts have settled judicial precedents to help give guidance)
- However, firms have asked for more specification of the statute and have convinced law makers to force the CFC to publish technical criteria (guidelines) this is currently being discussed in Congress.
- CFC realizes or acknowledge that Type 1 mistakes hurt its credibility in courts and among the general public.

Unilateral conduct

Chilling effects

- We have internal discussion amongst Commissioners to avoid any mistake since they will be magnified by firms.
- Avoiding Type 1 error is expensive and cumbersome, but committing those errors can create more damage to credibility.
- However being “*laissez faire, laissez passer*” when you have markets that are not working well will also affect the competition authority credibility.
- Cases:
 - Iusacell against Telmex for cross subsidies. (type 2)
 - Pemex and Mexlub (type 2)
 - Investigation on exclusive dealing of Coca Cola (only possible type 1, but not likely)

Chilling Effects and Mergers

Merger control under the FLEC takes care of those transactions that are relevant in monetary terms.

CFC shall decide whether the merger would confer substantial market power.

The criteria to determine the relevant market for purposes of an investigation related to monopolistic practices does not differ from that procedure used for merger-control purposes.

Mergers can be objected or subject to conditions.

Chilling effects and mergers

- An *ex ante* procedure is easier to enforce than *ex post*
- HOWEVER, there is more risk of Type 1 mistakes (*ex ante* is by nature speculative)
- Over enforcement could be more common; even with the help of lawyers eager to pass a merger at all cost, (accept or suggest conditions).
- CFC has to show restraint.

Chilling effects and mergers

Year	Total	No objection	Objected	Conditioned	Dropped
2005	152	140	2	7	3
2006	177	163	3	6	5
2007	176	161	3	4	8
2008	119	114	0	0	5
2009	92	86	2	2	2
2010	23	22	0	1	0
Total	739	686	10	20	23

Chilling effects and mergers

- Cases:
 - ❑ Coca-Cola-JDV Merger CFC established the obligation of FEMSA convenience stores to sell competition products. (Effects in distribution networks investment).
 - ❑ Televisa-Cablemas “*Must carry*” and “*must offer*” obligations to a TV network and cable companies acquired (effects in intellectual property investment/ regulatory decisions)
 - ❑ Senda-Transportes del Norte CFC order to sell shares in corporations previously acquired. (effects in court decisions derived of a Type 1 error)
 - ❑ Maseca bought a Corn flour Mill, CFC objects but due to untimely notification the acquisition is authorized without any condition. (Effects of a type 2 decision made by the judiciary)

What will help avoid Type 1 errors

- More clear cut separation of investigation areas from decision making body (create more counter balance)
- Specialized courts
- Publish criteria
- Regular publication of all precedents in web site
- Publication of Commissioners' votes

What will help avoid Type 2 errors

- Prioritization of investigations
- Better use of resources
- More training of personnel
- More advocacy and better explanation to courts and judges
- Better investigation devices (possibility of surprise raid to get information)

However....

- In Mexico **we should be more concern with under enforcement of our competition law than with over enforcement.**
- The priorities should be:
 - Give more tools to the CFC for investigation,
 - Have more and better prepared personnel in charge of investigations,
 - Raise administrative sanctions to international levels and
 - Criminalize cartels.

Transparency

Since march, contributing to transparency, a personal website was published containing the FLEC with commentary, votes, and other documents and references to competition :

<http://www.competenciaeconomica.com.mx/>