



Mexican Competition Law aligned incentives for effective cartel enforcement

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The Federal Mexican Congress last year amended the Federal Law of Economic Competition (the “FLEC”) and the Federal Criminal Code on May 10, 2011¹. One of the main purposes of these amendments was to achieve an effective cartel enforcement policy in Mexico through aligning the incentives to improve the “*carrot and stick*” approach when dealing with cartels.

I. Cartel enforcement in Mexico: history in evolution

Mexico shares the view that hard-core cartels are “*the supreme evil of antitrust*”². Therefore, they are subject to *per se* prohibition under article 9 of the FLEC³ since 1993 when the FLEC became effective.

At its inception, cartel prosecution was ineffective *inter alia* for the following reasons: (i) the FLEC shifted the former paradigm within the Mexican economic and social culture that was used to price controls and collaboration among competitors; (ii) the incentives for detecting and deterring hard-core cartel behavior were non-existent.

a) Paradigm shift

Cartel agreements among competitors were common and rooted practice in Mexico before the entry into force of the FLEC. The government was part of the problem. Thus, the first challenge for the Federal Competition Commission (“FCC”) was to foster a new competition culture and expel the harmful practices of the past.

Competition culture has slowly but gradually permeated within the Mexican landscape. But the task is far from completed. After 20 years of the FLEC’s enactment, the free-market and competition culture still needs to take hold within rural and urban small size companies and local authorities⁴ that have not glimpsed the paradigm shift. The FCC, the practitioners and the

¹ Amendments became effective on May 11, 2011.

² Supreme Court of the United States, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, (2004)

³ The article 9 of the FLEC includes four categories of hard-core horizontal agreements among competitors (“*absolute monopolistic practices*”) that are subject to *per se* prohibition: price-fixing, output restriction, market division and bid rigging.

⁴ On March 22, 2012, the FCC sanctioned two municipal officials that participated in a market division cartel in the “*tortilla*” market of Tuxtla Gutiérrez, Chiapas. Docket DE-014-2010.

chambers of commerce, among other actors, will play an important role to disseminate what competition means.

b) Lack of incentives

In the early years of the FLEC, the incentives to deter and detect cartel agreements were virtually non-existent. From 1993 to 2005 the FLEC did not provide for (i) an immunity program, (ii) specific criminalized cartel behavior; (iii) deterrent fines; or (iv) adequate procedural tools to investigate violations to the FLEC.

Therefore, it could be argued that an individual could make a prisoner's dilemma exercise as to comply or not to comply with the law. For instance, profits of cartel arrangements could be higher than the fines the FCC could impose⁵. Likewise, chances to be caught were slight since there were no sufficient procedural tools to assist the FCC in this endeavor.

From 1993 to 2005 the FCC sanctioned 41 cartel cases⁶, which meant approximately 3 cases per year.

II. Aligning the incentives

International experience demonstrates that cartel behavior is extremely profitable and difficult to detect. Therefore, the most effective policy to deter cartel behavior is through the implementation of a "carrot and stick" approach while dealing with cartel participants⁷.

The Mexican Federal Congress implemented two important amendments to deter and detect cartel behavior:

a) 2006 Amendments to the FLEC

The 2006 Amendments to the FLEC were a significant step to strengthen both the effectiveness and performance of the competition policy in Mexico. Regarding cartel enforcement, these amendments modified the existing

⁵ Up to USD \$1.5 million.

⁶ Source FCC's Resolutions Search Engine available at <http://www.cfc.gob.mx/index.php/es/publicacionesinformes>

⁷ R. Hewit Pate, "*Securing the Benefits of Global Competition*", U.S. DOJ, speech presented at Tokyo, 2004. Available at <http://www.justice.gov/atr/public/speeches/205389.htm>

“sticks” to prosecute cartels and introduce new investigative tools: (i) increased fines for absolute monopolistic practices up to USD \$6.8 million, (ii) added “buying cartels” as new horizontal or cartel behavior mischief, and (iv) provided new investigative and enforcement tools such as a limited search warrants to be requested before the judiciary⁸. Likewise, the leniency program was legally implemented.

b) 2011 Amendments to the FLEC and the Federal Criminal Code

The challenge in 2011 for the Mexican Congress was to align the incentives to effectively deter and detect cartel behavior. In May and August, 2011 there were important amendments to launch a deterrent factor for those violating the competition statute.

In connection with cartel enforcement, the May 2011 Amendments: (i) specifically criminalized cartel behavior with a three-to-10 year imprisonment term; (ii) increased fines substantially for cartel behavior up to 10 percent of the annual tax income of the offender; (iii) created a Mexican version of surprise verification visits, search audits or dawn raids; and (iv) created a new procedure to challenge FCC’s resolutions, including the need to have a specialized court within the federal judiciary to hear these challenges.

Later, the August 2011 Amendment introduced within the Federal Code of Civil Proceedings a detailed procedure for class actions, including those related to competition matters.

From 2006 to 2012 the FCC has prosecuted and sanctioned 11 cartel cases; fifteen additional cases are currently under investigation.⁹

Only time will tell whether the Mexican Congress succeeded in its attempt to effectively align the incentives to deter and detect cartel behaviour. The number of leniency applications after the 2011 Amendments are encouraging the belief the amendments will partially succeed. In 2011, 20

⁸ The Supreme Court declared the invalidity of the provisions that required that the FCC requested a court approval prior to execute dawn raids or limited searches. Docket 33/2006

⁹ Source: FCC’s Resolutions Search Engine available at:
<http://www.cfc.gob.mx/index.php/es/publicacionesinformes>

leniency applications were presented. So far this year 19 leniency applications have been presented.¹⁰

III. Required amendments

Although the FLEC and the FCC already aligned incentives for effective cartel enforcement in Mexico, there are still opportunities for improvement¹¹.

a) Clearer marker system for leniency applicants

One major defect of the Mexican leniency program in cartel cases consists on its lack of certainty as to the absence of a marker system –*ab initio*-. The implementation of a more precise marker system in Mexico would allow leniency applicants to provide certainty –*at the time of the filing*-, as to whether they are first, second, or subsequent applicants.

b) Settlement procedure for cartels participants

The FLEC does not allow the FCC to settle hard-core cartel cases as in other jurisdictions. The introduction of a settlement procedure for cartel cases will empower the FCC to deal quicker with these cases –especially those with *de minimis effects*–, as well as freeing up resources for investigations that have more relevance.

c) Independent investigation, prosecution and adjudication

The FCC's current institutional design allows that the Executive Secretary investigates, prosecutes and participates through legal staff in the drafting of the resolution for the FCC to adjudicate the case. Likewise, the Executive Secretary is the statutory secretary within the FCC and has to record deliberations of the FCC while adjudicating the case.

Such circumstance is subject to criticism even within the FCC Commissioners. Nowadays the Internal Regulations of the FCC (*Reglamento Interior de la Comisión Federal de Competencia*) is being discussed in the

¹⁰ Source: Eduardo Pérez Motta. “Aspectos Generales de las Reformas a la Ley de Competencia” Powerpoint presentation. Universidad Iberoamericana. México. October 4, 2012.

¹¹ See Omar Guerrero and Alan Ramírez, “Pursuit of effective antitrust enforcement: Mexico's case.” *International Antitrust Law & Policy: Fordham Competition Law* 2012.

Ministry of Economy and a confrontation within the FCC's Commissioners has occurred because of this subject. Three Commissioners¹² oppose to the draft approved by the Ministry of Economy because, *inter alia*, they consider that the Executive Secretary role should be limited only to the investigation stage.

d) Full judicial review of the FCC's resolutions.

The May 2011 Amendments provided for a new procedure for the challenge of FCC's resolutions and the creation of specialized courts to hear the challenge. Such amendments have not been completed due to the discussion as to the kind of judicial review that has to be implemented towards the FCC's resolutions. Will it be a full judicial review? Will the FCC take part in the proceedings to defend its resolution? What would be the role of the Executive Secretary? Would the Courts provide some deference to the FCC as specialized agency? Would the procedure mean to re-try the case?

IV. Conclusions

1. An effective cartel enforcement policy needs to align the incentives to improve the "*carrot and stick*" approach in dealing with cartels.
2. Only time will tell whether the Mexican Congress succeeded in its attempt to effectively align the incentives to deter and detect cartel behavior through the 2006 and 2011 Amendments.
3. There are still important areas of improvement in the current application of the competition framework in cartel cases.
4. The competition regime has reached a status where the FCC has the kind of tools it needed. Now the discussion will turn towards whether there are effective rights of a fair hearing, rights of proper defense and the relevant weight of the evidence secured by the FCC during the proceedings.

¹² Miguel Flores, Alberto Ibarra, and Cristina Massa.