CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

August 2013

The June 2013 Landmark Constitutional Amendments to Competition and Telecom Law in Mexico

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I. INTRODUCTION

This year will be remembered as one of the most important years in modern history for Mexican competition law. In the second quarter of 2013 a major amendment to Article 28 of the Mexican Constitution labeled "the Constitutional Amendment in Telecommunications" rocked the foundation of the Mexican Competition Regime ("2013 Amendment"). The goal of the 2013 Amendment was to mend, within the Constitution, the competition problems in the telecom sector. However, this amendment also drastically affects general competition policy and enforcement in Mexico.

After rapidly passing through both houses of the legislator and the majority of the State legislatures, the amendment was published in the Federal Official Journal on June 11, 2013.[2] Most parts of the 2013 Amendment became effective the following day while other, more detailed transitory articles will become effective at a later date.

The 2013 Amendment was a surprise, both domestically and abroad, as it came just two short years after the May 2011 Legal Amendment,[3] which strengthened the competition regime. The May 2011 Legal Amendment had not even been fully tested and now the 2013 Amendment changes the entire competition landscape. Embedded within the 2013 Amendment are undertones of distrust regarding current and future business communities, regulators, judges, and politicians. Changing the competition regime by way of constitutional amendment creates immobility in the law because constitutional amendments require political muscle not always enjoyed by Mexican lawmakers.

The success of the 2013 Amendment will depend on several factors: (i) efficiency of the new appointment procedures; (ii) proper appointment of specialized Federal Judges; (iii) quality of supplementary laws and regulations; (iv) how much we learn from past mistakes and successes; and (v) respect for due process and fundamental rights within competition proceedings.

II. THE FORMER MEXICAN COMPETITION REGIME

Until June 11, 2013 the Mexican Competition Regime comprised of: (i) regulatory framework, Article 28 of the Mexican Constitution, the Federal Law of Economic Competition ("FLEC") and other specialized laws; (ii) the competition enforcement authority, the Federal

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[2] *Available at* http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013.

[3] Published in the Federal Official Journal on May 10, 2011. It became mostly effective on May 11, 2011.

Competition Commission ("FCC"); and (iii) the Federal Judiciary, when competition cases were challenged on constitutional grounds (*amparo indirecto* and Federal Appeal/*recurso de revisión*).

Prior to the enactment of the 1992 FLEC antitrust law was seldom applied in Mexico. However, the enactment of the FLEC moved Mexico into a modern competition culture, and created its first specialized competition agency, the FCC. The FCC was to apply the "free market efficiency principles" found in the new statute.[4] The FCC was to act through its five commissioners as the investigator, prosecutor, and adjudicator of monopolistic practices, in addition to its preventive functions when analyzing concentrations.

The FCC struggled to gain international presence and recognition, as its early years were marked by a learning curve with the business community and practitioners. However, the FCC began to receive international attention through its role in the creation of the International Competition Network ("ICN"). There were also amendments in 2006 and 2011 to the FLEC attempting to strengthen its ineffective performance in its early years by adding some of the best international practices and adding "teeth" to enable effectiveness of its investigations and sanctions. But, still, the feeling of living in a country ruled by monopolies remained in the collective conscience. The FCC finally reached major status when its chairman, Dr. Eduardo Pérez Motta was appointed as chairman of the steering committee of the ICN in April of 2012.

Unfortunately, these achievements were often overshadowed by the lack of competition in Mexican markets (particularly the telecom sector). The final blow occurred in 2012 by the issuance of the *OECD Review of Telecommunication Policy and Regulation in Mexico*, which highlighted the serious competition issues in the Mexican telecom sector.[5] The 2013 Amendment somehow diminished the reputation that the FCC had built as its sets out its dissolution in favor of a new autonomous and constitutional authority: the Federal Commission of Economic Competition ("FCEC"). A challenge for this new authority will be to preserve and enhance the experience gained by the FCC during its 20 years of existence.

III. BACKGROUND OF THE 2013 AMENDMENT

The intentions to take action against the lack of effective competition and the high levels of market concentration in the telecom sector were evident from the beginning of the newly elected President Enrique Peña Nieto's administration. The first action taken was the "*Telecom Bill of Amendments*" which aimed to provide regulators with effective powers to create conditions of competition. Likewise, contrary to Constitutional technique, it set very detailed rules that would normally pertain to secondary laws rather than the Constitution.

However, the lack of competition in Mexico is not exclusive to the telecom industry. In fact, it is pervasive throughout nearly every industry in Mexico. Therefore, despite its name, through the Telecom Bill of Amendments the government has drastically altered the competition policy and enforcement within all industries of Mexico.

[4] *See* Carlos Mena, Biografía de una Comisión de Competencia, Competencia Económica. Estudios de derecho, economía y política, Porrúa, México, , pp. 27-52 (2007).

[5] *Available at* http://www.oecd.org/sti/broadband/50550219.pdf

A. The "Pact for Mexico"

The governmental response to the necessity of structural reform fostering productivity, growth, and competition in the Mexican marketplace, under the guidance of President Enrique Peña Nieto and with the cooperation of the three major political parties, was the "Pact for Mexico" which contained close to 100 actions and objectives that, if satisfied, would propel Mexico to its full potential. The "Pact for Mexico" signaled a political effectiveness that is in sharp contrast with the political disharmony and legislative stagnation present over the past 12 years.

Although the "Pact for Mexico" lacks legal basis it has proven to be politically effective in achieving structural reform—one of its most critical objectives—particularly in the areas of employment, education, and competition. The objective of structural reform in the telecom sector would seem to agree with previous attempts to strengthen the FCC and the competition regime in Mexico. However, in contrast to what many would have thought, the government presented a different, more aggressive, and deviant proposal than merely building from the strong foundation afforded by the FCC.

B. The Telecom Bill of Amendment

The drafting of this bill was done in secrecy to avoid outside influences from major players in the telecom industry. This bill proposal was unexpected because it was a major turn around in competition policy and enforcement; it was also harmful to the country's biggest broadcasters, who are normally supporters of the President. Regardless, the President sent the most aggressive bill proposal ever imposed on our competition regime to Congress on March 11, 2013 under the umbrella of the "Pact for Mexico." It passed in record time and was published in the *Federal Official Journal* on June 11, 2013.

IV. A BRIEF INSIGHT INTO THE NEW MEXICAN TELECOM REGIME

The cornerstone of the revolutionary 2013 Amendment is the creation of a new independent super-regulator and telecom competition authority called the Federal Institute of Telecommunications ("FIT" or "IFETEL" as known in Spanish). The FIT takes over the authority held by the FCC. This amendment created, after some debate, two separate competition and constitutional autonomous authorities: FIT for telecom and the FCEC for all other sectors of the economy.

In addition to the creation of these agencies there are other new features worth highlighting, including the access of telecom as a human right, as well as permitted foreign investment up to 100 percent in telecommunications and communication technology, and up to 49 percent in broadcasting. There is also the consolidation of power, meaning the FIT will be the sole authority in the telecom competition sector. Further, digital terrestrial television must be made available by December 31, 2015. And there are obligations in regards to digital signals as well as the requirement to offer two new national television networks, state-ensured installation of shared telecommunications network, and revealing substantial economic agents holding more that 50 percent market share.

V. THE COMPETITION AGENCY'S INSTITUTIONAL TRANSFORMATION

Likely the most important changes to the competition regime are the changes in institutional design. The 2013 Amendment surprisingly sets forth the dissolution of the FCC, an administrative agency, and supplants it with new constitutional agencies, the FCEC and FIT. The FCEC will handle matters of general competition policy and the FIT will be the exclusive agency for competition in the telecom sectors (including radio and TV).

A. Legal Nature Of The New Competition Regime

One of the major issues with the FCC was that it was an administrative body autonomous in regulations and adjudications but hierarchically and financially subordinated to the Ministry of Economy. The 2013 Amendment tackled this issue head-on by creating constitutionally autonomous entities. This protects the agencies from being subordinated to any other body, effectively eliminating the FCC's previous issue but adds a more complex procedure for appointment of Commissioners.

B. Appointment Process Of the New Commissioners

Previously the President had the authority to appoint anyone qualified for the position to any of the five commissioner positions of the former FCC. The 2013 Amendment to Article 28 of the Constitution states that commissioners shall be appointed in a three-step process: (i) Pre-selection Stage—a committee will send a list of three to five applicants to the President; (ii) Selection Stage—the President will select one candidate from the list[6]; and (iii) Ratification Stage—the Senate must ratify the President's selection within 10 days by a two-thirds vote.

If the Senate rejects the selection, the process is repeated once more ,taking an additional name from the list of the pre-selection stage. If not successful, then the President holds the authority to appoint the relevant Commissioners from the pre-selection stage list of candidates. One important issue to avoid in this cumbersome process is Regulatory Capture; this process could be susceptible to political influence and private interests.

VI. THE NEW CONSTITUTIONAL POWERS OF THE COMPETITION AGENCIES

Before the 2013 Amendment it was the former FLEC that granted powers to the FCC; the Constitution only mandated the prosecution and the punishment of monopolies or monopolistic practices that caused actual harm to consumers. Thus, Congress delegated powers to the FCC. The 2013 Amendment is distinguishable in that the Constitution, not Congress, explicitly grants powers directly to the FCEC and FIT. These powers are the ability to remove barriers to competition and free market, regulate access to "essential facilities," and order the divestiture of assets in the necessary proportion to remove anticompetitive effects. One important factor to note is that Article 28 of the Constitution seems to re-assume the concept of monopoly (and excessive concentration) and not simply rely on monopolistic practices.

The usefulness of these new powers will depend on the manner in which they will be detailed in competition law. Whatever its implementation, the following elements should be considered:

[6] As of August 23, 2013, the President has already sent the list of its 7 proposed candidates. The ratification stage by the Senate is still pending but expected by the first two weeks of September 2013.

- Due Process and Fair Procedure: With their newly granted powers, the FCEC and FIT should be compelled—more than any other authority—to be respectful of the fundamental human rights of economic agents. The fact that their power is granted directly by the Constitution does not exempt them from respecting due process and fair procedures.
- Proportionality: The power to divest assets should be treated very carefully. It should be the last resort for the agencies.

Of course the 2013 Amendment also includes checks on the FCEC and FIT, such as submitting annual programs and quarterly reports to both executive oversight and Congress, obeying summons to appear before Congress, having an internal comptroller, and being subject to constitutional disputes.

VII. CHALLENGING THE NEW AGENCIES' RESOLUTIONS

FCC proceedings had two main stages, the investigative stage[7] and the adversarial proceeding.[8] After a resolution, parties could internally challenge the resolution through direct recourse to be heard by the FCC.[9] After re-hearing the resolution the parties could file a constitutional lawsuit ("juicio de amparo directo") within 15 business days. This suit would be heard by a Federal Judge to analyze whether there was a constitutional or human rights violation in the FCC proceedings—it was not a review of the merits of the claim. That judgment would be subject to appeal to the Collegiate Circuit Court.

The entirety of a lawsuit after exhausting all remedies at law could take from 4 to 7 years of litigation, or worse if there was a "stay of execution." It was a good idea to expose the FCC to judicial review but it also somewhat undermined the FCC by making them just a starting point for litigation, among other issues.

Even with amendments to this cumbersome system the amount of cases adjudicated fully by the FCC seemed low. The fact was that the means of challenging competition cases had been abused (especially in the telecom arena). The device selected to challenge acts of authority (FCC resolutions) was used by some practitioners to avoid actual enforcement of fines and resolutions of the antitrust authority.

This issue was dealt with aggressively within the text of the 2013 Amendment of Article 28. Article 28 provides that the sole means to challenge a resolution by the FIT or the FCEC would be an indirect *amparo* or "*amparo indirecto*" subject to a federal appeal ("*recurso de revisión*") to a Collegiate Circuit Court. It also established the need to create specialized Federal Courts to hear telecom and competition cases. Likewise, it forbid any challenges during the proceeding, and eliminated the possibility of securing a stay or measure to maintain status quo except in cases of fines or asset divestiture, but not against other measures or resolutions of the FCEC. Likewise, there is no chance to file indirect *amparo*s for any other resolution rendered by the FCEC during the proceedings but the definitive one.

[7] FLEC §30.
[8] FLEC §33.
[9] FLEC §39.

These measures taken by the 2013 Amendment have been labeled aggressive because they likely could have been left to supplementary legislation instead of being inserted into a constitutional amendment. Stating an entire prohibition at the constitutional level sends a strong message of distrust regarding the judiciary. In our view, the internal challenge could have remained optional instead of being totally eliminated.

Another major feature created at the constitutional level was the creation of specialized courts for telecom and competition courts that will sit at the Federal District and will have jurisdiction for the entire Mexican territory. Thus, it eliminates forum shopping but could create "judicial capture." Currently, the Federal Judicial Council has re-assigned certain federal administrative courts as specialized tribunals for telecom and competition matters.[10]

VIII. *PER SE* RULE FOR CARTEL VIOLATIONS

Before the May 2011 Amendment to FLEC, Article 28 of the Constitution and the FLEC §9 dealing with cartel and collusive behavior were not symmetrical. The Constitution required real harm to consumers (paying monopoly profits and expressly "exaggerated prices"). The FLEC, however, forbids price-fixing, exchange of sensitive information used for price-fixing, market division, output restriction, and bid-rigging. Thus the FLEC forbid not only "purpose" but also the "effect" of collusive behavior. The FCC sanctioned cartel behavior regardless of size of participants or affected market. The issue was whether the language of the FLEC exceeded what is allowed by the Constitution (requiring actual harm).

After the 2013 Amendment there are now two conditions for cartel behavior: (i) any combination or agreement among competitors to avoid competition among themselves or (ii) forcing consumers to pay exaggerated prices. Therefore, the 2013 Amendment sanctions cartel behavior as *per se* illegal in one of its hypothesis to make it symmetrical to the FLEC.

IX. CRIMINALIZATION OF COMPETITION INFRINGEMENT

Article 28 of the Mexican Constitution bans monopolies and monopolistic practices stating that they will be severely punished and effectively prosecuted. The May 2011 Amendment to the Federal Criminal Code criminalized intentional cartel behavior making such behavior punishable by 3 to 10 years in prison. The crime however, could only be prosecuted after the resolution of the FCC was not subject to any kind of challenge (totally definitive or *res iudicata*) and if the FCC filed a direct criminal claim ("*querella*") before the Federal Attorney's Office; this granted the FCC power to "pardon" offenders. Since 2011, we have found no evidence of a single criminal notice or indictment for these cases.

Conversely, the 2013 Amendment explicitly states not only that cartel behavior must be criminalized but also that within 180 from the Amendment's effective date the Congress will legislate special crimes punishing anticompetitive practices and other concentration activities. We will have to wait to see the effects of the supplementary legislation, but it could send the wrong message to the business community if Congress criminalizes activities subject to a *rule of*

[10] *See* transitional article fourth of the General Official Letter 22/2013 issued by the Federal Judicial Council that was published at the Federal Judicial Journal on August 89, 2013. This official letter sets two district courts that will hear indirect amparos and 2 collegiate circuit courts that will hear federal appeals or recursos de revision of those indirect amparos.

reason approach, especially when combined with the need to properly train Federal Judges in competition matters. It is for these reasons lawmakers should be very tactful when creating the relevant criminal amendments in competition law. Likewise, there is the temptation to ban monopolies *per se* rather than monopolistic activity. Over-deterrence should be avoided.

X. ORDER TO IMPLEMENT THE CONSTITUTIONAL AMENDMENT

The 2013 Amendment establishes guidelines in eighteen transitory articles that require Congress to make a full review of supplementary competition laws and their regulations, which are to be implemented within 180 days of the Amendment's effective date, as mentioned above. The question is whether this grants enough time for a proper and tactful drafting of the supplementary legislation.

Regardless of the deadline, if Congress fails to comply there will be no repercussions because of legislative immunity. One other concern is to what extent will the major overhaul be regarding enacting a new competition statute and regulations. Finally, an interesting issue will be to what extent class actions and individual redress rules will be shaped to incentivize these kinds of actions within the Mexican competition framework. This trend has been missing in antitrust matters.

XI. CONCLUSION

The 2013 Amendment marks a very shocking and aggressive change in the competition landscape. It creates the FCEC and FIT, which will be two of the most powerful agencies in Mexico, and it must be said that with "great power comes great responsibility." Improper actions by these agencies will result in state liability. It is because of this great power that regulatory and judicial capture must be avoided at all costs.

The FCEC must also not begin anew but, instead, build off the experience afforded by the FCC. It is imperative to use the experience of the FCC because with the lack of a "stay of proceeding," state liability will increase if the resolutions passed are overturned. A major key to overall success or failure will be the appointment of new commissioners and the implementation of the supplementary competition laws and regulations. The final test of the structural changes will be the effective application of the regulatory framework by the new agencies.