Antitrust Damages Claims: is Mexico in The Right Path?

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Never in the history of Mexico has an individual antitrust damages claim been successful. However, in May 2014, the new Federal Law on Economic Competition (FLEC) provided clearer criteria for when and how a claim of antitrust damages may be carried, this brings new hope in the system. Nonetheless, to be successful, the new specialized competition courts will need to develop new interpretations of Civil Law institutions (civil liability) so that affected parties are able to recover damages from antitrust injuries.

I. INTRODUCTION

The constitutional amendments on antitrust and telecommunications (2013) certainly developed, as never before, the system of competition law and boosted the antitrust authorities to prosecute and punish anti-competitive behaviors. Such changes were mainly achieved by granting constitutional autonomy and unprecedented faculties to the Federal Competition Commission and the Federal Telecommunications Institute (jointly, the competition authorities). It could be argued that, as a counterweight to the reloaded force of the competition authorities, the Federal Courts specialized in competition, broadcasting and telecommunications were also created in order to exercise judicial control over such competition authorities. However, the amendments apparently forgot to strength the system to allow individuals or private parties to claim damages for unlawful monopolistic practices or illicit mergers.

In 2014, the Federal Congress issued the new FLEC, incorporating new provisions that, among other relevant aspects, helped to make clear the rules for the antitrust damages claims. Such claims previously constituted a gray area that did not allow the development of antitrust private enforcement.

Article 134 of the FLEC reads:

"Individuals that may have suffered damages or losses deriving from a monopolistic practice or an unlawful concentration have the right to file judicial actions in defense of their rights before the specialized courts in matters of economic competition, broadcasting and telecommunications, once the Commission's resolution is final and conclusive.

The statute of limitations for lodging damages claims shall be stayed by the decision to initiate an investigation.

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The Economic Agent's illegal actions shall be proven with the final resolution issued under the trial-like procedure, for the effects of lodging damages claims."

II. THE PROCEDURAL CHALLENGES WERE ALMOST ALL RESPONDED, BUT THERE STILL SOME MINOR UNSETTLED MATTERS.

Pursuant to article 134, the "statute of limitation" problem was clarified since the term to claim the restitution of damages now will be interrupted from the beginning of the investigation by the Investigative Authority of the Federal Competition Commission or the Federal Telecommunications Institute, accordingly. This would allow the two-years-term established in article 1934 of the Federal Civil Code to be interrupted once an investigation has been initiated.

The new law also clarified that the new specialized District Judges and Federal Collegiate Circuit Courts will have jurisdiction on antitrust damages claims. However, in this regard it should be noted that these courts where created to rule on the writ of *Amparo* proceedings (a remedy for the protection of constitutional rights) and are considered administrative courts — specialized on competition issues. Therefore, in principle, the judges and magistrates' expertise is not precisely on the application of Civil Law in private disputes. Nevertheless, for the time being, this should not be a problem since the current conformation of the courts includes legal experts capable to adjudicate antitrust damages disputes according to Civil Law criteria.

However, a procedural problem still remains. District Judges might have jurisdiction over antitrust damages claims, but Federal Collegiate Circuits Courts cannot act as appeal courts in those civil cases, (since they only have jurisdiction in the writ of *Amparo* proceedings). In accordance with the Mexican legal system only Unitary Circuits courts can hear the challenge against rulings issued by the District Courts when they are ruling civil cases, and these Unitary Circuit Courts have not been created; so this particular procedural matter must be corrected as soon as possible by the Federal Judiciary.

III. THE PROBLEM OF THE STANDARD OF DAMAGE UNDER MEXICAN LAW

Antitrust damages are subject to a very rigid standard established by the rules on civil liability developed by scholars and jurisprudence on Mexican Civil Law, both of them, deeply influenced by French Civil Law of Napoleonic heritage.

Under such classical Civil Law, the standard of damage that must be proved before a Court contains the following elements:

a) Damage to property, which involves procedural and substantive elements. Compensation can only be claimed by the person whose property has been damaged. The damages cannot be claimed by non-victims, abstract damage cannot be argued either (e.g. damage to the competition process or damages to the "economic efficiency" not the "social welfare"). This element might conflict with the damages suffered by a collectivity since the plaintiff is not exactly who suffers the damage in its property, but a group of people recognized by the law as entitled to claim compensation due to damages.

However, the Court settling a claim for damages in an antitrust class action will face the challenge of developing a broader standard of damage considering a recent rule in the Federal Procedural Civil Code (2011). Such rule considers the collective damage by affectation to rights related to diffuse interests that not necessarily holds a legal relation with the plaintiff ("collective damage" shall not be confused with the "aggregate damage", which is the sum of all personal/individual damages that would be claimed in a class action massive tort).

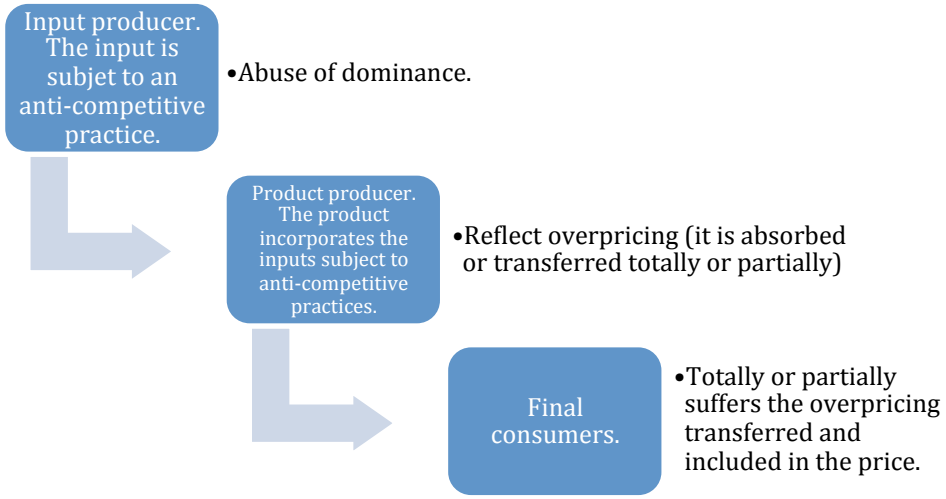
b) Actual, doctrine and jurisprudence has been establishing that the damage must be actual, certain, and effective, not hypothetical, not conjectural and not merely possible. The Court must be convinced that the damage has occurred, is occurring or will certainly occur. The Court then must reject the harm caused by the assumption attributable only to the imagination. What the Court should look for is certainty about the existence of damage.

This feature also means a major challenge for the specialized courts. The first thing to accept is that the assessment of the accuracy and amount of damages involves complex economic analysis. Analysis that in many cases involve a comparative exercise between the situation after the offense and the hypothetical situation that would have existed without the addition of any anti-competitive conduct besides econometric exercises specifically based on assumptions of hypothetical cases.

At the moment when the economic analysis involves a hypothetical scenario, the certainty of the existence of the damage could be questioned. Therefore, the first thing to accept is that it is impossible to accurately establish the amount of antitrust damages because the evidence on the "hypothetical case" are mere assumptions based on economic theory and analysis and, in the best scenario, accompanied by demonstrative econometric models. Therefore, the judges in such cases will face economic estimates. This will have to be accepted by the specialized courts; otherwise, no case could fit in the very rigid standard of damage outlined by classical civil law. This, not because the estimates were not accurate — such notion should be discarded — but because the certainty of the existence of the damage cannot be challenged on the grounds of lack of accuracy in their estimation.

c) Direct and immediate, it is required that the damage is the direct and immediate consequence of the anti-competitive practice. This feature requires that the link between the damage and its cause can explain that, from the anti-competitive practice — as preponderant cause — damage occurs.

Precisely, this is the most problematic characteristic for the specialized courts because, in most cases related to competition, damages may be indirect and mediate result from successive transfers (passing-on) of the damage (totally or partially) along the value chain and the consumption chain of goods and services affected by anti-competitive practices.



In this context, specialized courts have a challenge to update the old standard of damage required by the institutions of civil law. Specialized courts cannot ignore that failing to recognize indirect and consequential damages from anticompetitive behavior is tantamount to tolerate damages transferred downstream or upstream, when the direct victim and the one who transfers them do not have a legal duty to absorb such damage.

In Mexico, in environmental law and consumer law, the statutes and jurisprudence has shifted to recognize indirect and consequential damages, as well as a causal link divided into several sections.

Such developments imply updating the characteristics of the damage to complex contemporary life situations that were not necessarily covered by the scholars of the classic civil law nor the editors of the Civil Codes.

Thus, it is necessary to redefine the standard of damage to be required by Courts in order to cover the damage to property and collective damage; actual damage; direct and immediate, as well as indirect and mediate damage, characteristics subject to a control rule: the reasonable foreseeability of the harm. Such standard necessarily must be based on economic theory and judicial experience — of specialized courts, that lead to the construction of a coherent system of antitrust damages.

To achieve this, it is essential that the specialized courts are willing to make a bold judicial interpretation of Article 134 of the FLEC and pursuant to the human rights implied (access to justice, complete compensation and effective access to markets with effective competition) in order to reach a more aggressive system against anticompetitive behavior.

IV. THE CHALLENGE TO IMPROVE THE DESIGN OF CLASS ACTION SYSTEM TO CLAIM AGGREGATE DAMAGE.

There is no credible means in Mexican law to claim the "aggregate damage" from monopolistic practices through a class action. This, understanding the "aggregate damage" as the result from adding all the damages suffered by economic agents and consumers who participated in the affected market or related markets in which the anti-competitive practice take place.

This, because the Mexican class actions system is based on the formula opt-in. In a class action system there are two ways in which the ruling binds to the class: (i) opt-out, in which the outcome of the trial has general effects (win or lose) and only is excluded the persons who expressly unlink, and (ii) opt-in, where the ruling covers only those who expressly added as plaintiff (e.g., from the initial claim until 18 months after judgment is issued in the case of Mexico — cf. Federal Code of Civil Procedures).

In Mexico, besides that the opt-in system prevails, it is excluded the possibility that another class — made up by those who did not adhered themselves to the first trial — claim damages in a subsequent trial. Thus, it is ensured that there is only one massive trial in which the chances of all affected by anti-competitive practices to joint to the outcome of the trial are not only unlikely, but remote.

This situation has led to several practitioners to argue that in Mexico there is no real class action for antitrust damages that allows claiming an "aggregate damage." The effectiveness of the system of class actions is void until the formula opt-in is not replaced by the opt-out, which favors aggregate claiming.

The result of such class action system is to lead to an unlawful enrichment, supported by the legal system itself, which should favor the collective damage claims.

V. CONCLUSIONS

Beyond doubt the new text of the FLEC represents a major step forward for antitrust damages claims in Mexico. Many procedural problems were overcome and the remaining problems for individual claims are solvable in the short term.

Regarding the conflict between the classical civil law standard of damage against the requirements in antitrust cases, it is expected that specialized courts adopt a more flexible view of the concepts of immediate and direct damage. If jurisdictions such as France or Germany have been able to solve that issue, in Mexico it could also happen through judicial interpretation.

Now, concerning class actions, we cannot be so optimistic, the system was not improved and breakthroughs in the short term are not expected until the opt-in system is not adopted in the statutory rules.