Market Investigations as a New Tool for Competition Agencies: The Mexican Experience

By Carlos Mena-Labarthe[1]

I. WHAT ARE MARKET INVESTIGATIONS?

Market investigations are proceedings by which a competition agency can assess the functioning of a determined market and evaluate it holistically. This, with the purpose of determining whether competition is functioning and, if not, to impose remedies to correct the corresponding failures.

These proceedings do not focus on the conduct of a specific firm and will not seek to determine a violation of the law or to establish general rules for market participants. Instead, they are directed to improve the functioning of the market as a whole. Its all-embracing framework allows market investigations to tackle adverse effects on competition from any source and determine remedies for the whole market.[2]

The first step in market investigations is acknowledging that something in the market is not working well and that it needs intervention from the competition authority. However, in this first moment, authorities cannot be certain of the sources of the problem, there is a suspicion that there might be competition issues that need a remedy or change.

Competition authorities will open an investigation in order to look at the market characteristics. There, they will seek to identify the existence of anticompetitive features that might be reflecting undesired outcomes such as high prices, lack of innovation, low customer responses to prices, among others. At this point, it is important to stress that the identification of anticompetitive features in a market is not a simple task since not all competition problems are obvious.

Once the anticompetitive features are identified, the next step for authorities will be to make a competition assessment of such features and to identify if the source of the problem can be addressed with competition remedies. Authorities will look at behavioral, structural and regulatory features integrally.

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[2] CC3 (Revised) — Guidelines for market investigations: Their role, procedures, assessment and remedies April 2013.

Finally, if the authority determines that the origin of the problems is the lack of effective competition conditions, it will be able to come up with solutions to restore the efficient functioning of the market. Normally, the authorities have an available pool of remedies for market investigation findings, including recommendations to other governmental bodies, behavioral remedies such as the imposition of mandatory orders for firms and individuals, and structural remedies such as divestiture of assets. It is important to remark, that as result of these proceedings, authorities do not determine individual responsibilities, so there is no imposition of sanctions. Additionally, it is worth noting that these powers should be exercised responsibly, accordingly, authorities need to balance benefits and disadvantages of such an intervention and authorities will need to evaluate their actions later on.

There has been a debate in trying to identify the nature of market investigations, specifically, if they can be classified in one of the traditional ex-ante or ex-post toolboxes.

Some would argue that these tools seem more "ex-ante" as they try to prevent anticompetitive conducts through predicting the possible market outcomes of a present market situation, as it happens in merger review or in regulatory analysis. On the other hand, some commentators have argued that it is more similar to "ex-post" antitrust analysis, as authorities have to look at the evolution of the market, which includes the existence of past behaviors. However, as opposed to antitrust traditional tools, past conducts in market investigations are not subject to sanctions, but they are only a feature to analyze along with other market characteristics.

Market investigations are a new non-traditional tool for competition agencies to intervene more efficiently. From my point of view, market investigations have a mixed nature. They stand half way right in the borderline between an ex-ante and an ex-post tool. They combine both types of analyzes, and they are an optimal resource for competition agencies to enhance efficient markets with both structural and behavioral anticompetitive features, through broader remedies than the traditional antitrust ones. Accordingly, I would classify these tools as corrective in nature and would stress their very different nature.

In Mexico, for example, the power to conduct market investigations is new and its creation corresponds to an urgency for more profound and rapid changes to markets with serious competition problems. Most of the times, markets where privatization occurred and the rules of the markets were not correctly drafted to protect, not to say, promote, competition. In 2013, the Constitution was amended to introduce the powers for the competition authority to "eliminate barriers to competition and regulate essential inputs". Since 2014, the Federal Law of Economic Competition (FLEC) provides that the Federal Commission of Economic Competition (COFECE by its Spanish acronym) [as well as the Federal Telecommunications Institute "IFT" by its Spanish acronym) in the telecommunications and broadcasting sectors] has the power to carry out a special investigation procedure to determine the existence of essential inputs and to eliminate barriers to competition. What we have named "market investigations."

II. THE EXPERIENCE IN MARKET INVESTIGATIONS AROUND THE WORLD

The United Kingdom ("U.K.") is the most experienced jurisdiction in carrying out market investigations. They were introduced back in 2002 through the Enterprise Act to replace those investigations that were already in place with a similar, yet more limited, scope and that were conducted by the Monopolies and Mergers Commission.

As of early 2016, 18 market references had been carried out by the U.K. Some of the sectors in which these procedures have been applied include airports, local bus services, movies on pay TV, cement and private healthcare. Regarding their outcomes, because of the wide pool of remedies available for the U.K.'s competition authority, it has been able to impose a package of remedial measures, instead of single remedies. According to the pursued aim, among such remedies put in place one can find those entitled to market opening, strengthening consumer response or changing the structure of the market, including, exceptionally, divestiture of assets.

From the revision of the U.K. experience, the most challenging issue comes from finding the correct remedies. For instance, in the private motor insurance investigation, the CMA failed to find an appropriate remedy to address the "cost separation"3 inefficiency.

A 2013 reform in the United Kingdom amended and improved its market investigations regime in different ways. For instance, it defined new timeframes for the conduction of the investigations and for the implementation of the mandated remedies. Currently, there are four market investigations pending, for instance, in the markets of energy and retail banking.

Due to its success, U.K. market investigations inspired a nearly equal regime in Iceland. This regime is based on Art. 16 of the Icelandic Competition Act, which authorizes the Competition Authority to take measures against circumstances or conducts that prevent, limit or affect competition to the detriment of the public interest, even in cases when the provisions of the Competition Act have not been violated.

As a result of a market investigation, in 2013 the Icelandic Competition Authority ("ICA") instructed the operator of the Keflavik Airport to ensure that new competitors in the market for operations of passenger flights (to and from the airport) would have access to vital airport slot times, so they could compete in that market. Among other instructions, the ICA ordered the airport operator to prepare guidelines for the independent slot allocation coordinator considering competitive factors when allocating available slots.[4]

There are also other competition tools available in some jurisdictions to exercise market control that are similar to market investigations. Some of them are aimed to solve market failures not addressed specifically by competition law provisions, to grant access to essential inputs, and most of them, to eliminate regulatory barriers to competition.

- In Spain, since 2013, the National Commission of Markets and Competition has the power to challenge before the Courts Public Administration's legal actions and general provisions hierarchically inferior to law that hinder the maintenance of effective competition in the markets (article 5.4 Law 3/2013). This power is remarkable, because it gives the Commission the power to issue mandatory orders to eliminate regulatory barriers to competition, when most of the countries can only issue non-binding opinions.
- Likewise, in Peru, the competition authority (INDECOPI) has the power to eliminate "bureaucratic barriers to competition." During 2014, the Commission for Elimination of Bureaucratic Barriers of INDECOPI received 297 complaints, 68 percent of which it considered grounded.

[3] Consisting in the fact that the insurer liable for a non-fault driver's claim is often not the party controlling the costs.

[4] Icelandic Competition Commission. "Slot allocation at Keflavik Airport disrupts competition in the air transport market." Accessed November 5, 2015.http://en.samkeppni.is/published-content/news/nr/2268.

- In Australia, the National Access regime establishes mechanisms by which access to infrastructure services can be sought — this power is not limited to specific industries. The mechanisms include declaration and arbitration, access undertakings and the certification of effective state access regimes.[5]
- In the United States (U.S.), Section 5 of the Federal Trade Commission ("FTC") Act, prohibits ''unfair or deceptive acts or practices in or affecting commerce.'' Even when the U.S. Congress did not define, what constituted "unfair methods of competition" the FTC has been entitled to apply the statute. As the FTC has recognized in the "Statement of Enforcement Principles," Section 5 can be applied as a standalone provision to address acts or practices that are anticompetitive but may not fall within the scope of the Sherman or Clayton Act.[6] Some commentators have pointed out that this Section gives FTC a "broad power of market regulation that potentially spans the boundary between competition law and regulation."[7]

From my point of view, it is important for competition agencies to look at the international experience. However, there is no unique model that fits all countries. Each jurisdiction should develop a policy of its own, according to the characteristics of their legal background, their constitutional principles and their markets and the strategic objectives they have established in their competition policies.

III. MARKET INVESTIGATIONS IN MEXICO

In 2013, the Mexican Constitution was amended to promote more competition and establish more independent and powerful authorities, especially in the telecommunications sector. This reform created two new constitutional autonomous bodies, COFECE and IFT, to protect and guarantee free market competition. The constitutional reform established that this authority should be granted with all the necessary powers to fulfill its duty, including the powers to regulate the access to essential inputs, order the elimination of barriers to competition, and mandate the divestiture of assets or shares in the necessary proportions to eliminate anticompetitive effects.

The reason for these major changes — which were approved by the three major national political parties — was the urge to promote competition in a rapid manner and to tackle problems that are mainly of a structural nature. Above all, those problems are associated with unsuccessful liberalization processes, which derived in anticompetitive regulations and weak competitive pressures in general.

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[5] Australia Competition and Consumer Commission, "National access regime under Part IIIA." Accessed November 5, 2015. https://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure/national-access-regime-under-part-iiia

[6] The principles to challenge an act or practices as an unfair method of competition in violation of Section 5 on a standalone basis, should consider following principles: (i) the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare; (ii) the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and (iii) the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

[7] Niamh Dunne, Between competition law and regulation: hybridized approaches to market control, Journal of Antitrust Enforcement, (2014), pp. 1–45.

Arising from the constitutional amendment, a new competition law was enacted but the process was not an easy one. When the FLEC was being discussed in Congress back in 2014, a congressional advisor wrote a critique of the concepts of barriers to competition and essential facilities saying that they were "UFOs" meaning they were Unidentified Legal Concepts (for its acronym in Spanish, of course). Moreover, many commentators, national and international wrote papers and published editorials arguing against this tool. The private sector opposed the legal provisions vehemently. Nowadays, some doubts remain, and it is our duty at the Commission to remain responsive to concerns regarding the new powers.

IV. BARRIERS TO COMPETITION

Generally, barriers to competition appear to be of a very different nature and can be represented by features such as pieces of legislation, brands' prestige, lack of access to financing or asymmetric information, among many others. Normally, the economic literature deals with barriers to entry but not with other types of barriers to competition.

When discussing the bill in Congress, a big debate emerged because of the lack of a clear definition for "barriers to competition and free market participation." As a result, under Mexican competition law and for the purposes of market investigations, article 3 of the FLEC provides that barriers to competition and free market participation consist of: any structural market characteristic, act or fact conducted by the economic agents that: (i) impedes access to competitors or limits their ability to compete in the markets; or (ii) impedes or distorts the process of competition and free market participation. In addition, they can be legal provisions issued by any level of government that unduly impede or distort the process of competition and free market participation.[8]

Barriers to competition for the purposes of market investigations do not imply the existence of an anticompetitive behavior, but a feature in the market that might be hindering effective competition. It is also important to say that in market investigations, the remedies are not sanctions, since the special procedure established in article 94 is not of a punitive nature but rather of a corrective one.

V. ESSENTIAL INPUTS

As was the case with barriers to competition, when the bill for the new FLEC was being discussed in Congress, some legislators argued that the bill did not provide a specific definition of "essential input." That the essential facilities (if they could be defined as such) doctrine in many countries had been abandoned. In consequence, they heard arguments for or against the essential facilities doctrine and the evolution of the concept in various jurisdictions.

As a result, the FLEC provides a clear way to identify essential inputs. It can be said that it takes into consideration what has been decided and written about the concept around the world. Article 60 of the FLEC provides that in order to determine its existence COFECE should consider: 1) if the input is controlled by an

[8] Article 3, subsection IV, Federal Law of Economic Competition. Available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE.pdf

economic agent with market power; 2) if the reproduction of the input is feasible taking into account technical, legal or economic elements; 3) if the input is indispensable for the provision of goods or services and has no close substitutes; and, 4) the circumstances under which the economic agent managed to control the input.

This provision was carefully developed in order to avoid free-riding problems and discouragement of investment because market investigations are not in any sense protecting less efficient competitors from firms that lawfully acquired its market power as some observers have argued.

VI. DUE PROCESS

With all these powers that represent new possibilities for competition authorities to intervene, of course, the new worries are if due process is protected, and if there is a correct judicial review.

Undoubtedly, the course of investigation procedures plays a critical role in the achievement of credibility and legitimacy for competition authorities. This is the reason why special emphasis was put in Congress when designing the provisions that guarantee due process for economic agents and even for corresponding regulators. It must be said that during the legislative process, the main discussion was how the authority would have to apply the concepts regarding market investigations and how the possible affected parties could defend against a procedure like this.

In Mexico's legislation, market investigations consist of rigorous procedures with specific terms and conditions. The procedure was designed to guarantee due process: right of defense, independence of decision-makers and judicial review.

To begin with, the market investigations procedure may initiate either ex-officio by the Investigative Authority or per request of the Executive Branch; the Investigative Authority is an independent body within the Commission. The investigation officially begins with the issuance of an Initiation Order whose extract is published in the Federal Official Gazette. The purpose of this publication is to enable any person to provide COFECE with elements of investigation during the course of the procedure.

During the investigation stage, the Investigative Authority is compelled to use its investigation powers within the established legal limits foreseen in the FLEC, including the requisition of reports and necessary documents, serve subpoenas to firms and individuals that are related with the case in question, conduct searches and order any diligence that is deemed adequate.[9]

Upon conclusion of the investigation, if the Investigative Authority determines that there are no effective competition conditions in the investigated market, the Investigative Authority shall either issue a preliminary investigative opinion or otherwise propose to the Plenum the closure of the file.

As for the preliminary opinion, the Investigative Authority shall propose the remedies esteemed necessary in order to eliminate the restrictions to the efficient functioning of the investigated market.

[9] Article 28, subsection II, Federal Law of Economic Competition.

Remarkably, for the issuance of such opinion the Investigative Authority can request a non-binding technical opinion to the coordinating body of the sector, which helps to avoid a biased approach.

To strengthen procedural fairness, the FLEC provides that the economic agents may come before the Commission in order to present their defense.

It is pertinent to mention at this point that the involved economic agents are given the opportunity to propose suitable and economically feasible measures to eliminate the competition problems identified. Furthermore, in case the Plenum rejects the proposal, it is obliged to justify the motives of its decision.

In compliance with the basic principle of judicial review, according to the 2013 constitutional reform, the decisions of the Commission may be contested through a writ of indirect Amparo. Remarkably, in cases where the Commission imposes fines or the divestiture of assets, the orders will not be executed until the indirect Amparo[10] is resolved.[11]

For the sake of due process, the recent constitutional reform also created new specialized courts and not only will they be responsible for carrying out these indirect Amparo actions but they will also have a major role in competition law enforcement by establishing several criteria concerning the Commission procedures arising from the entry into force of the new legislation.

VII. THE FIRST CASES

In February 16, 2015, an investigation under article 94 of the FLEC was initiated in the market for the provision of air transport services that use the International Airport of Mexico City for its landing and/or take off procedures, under the file IEBC-0101-2015. In February 29, 2016 — only a year after the beginning of the investigation —, the Investigative Authority made public its Preliminary Investigative Opinion concerning such file. As part of the major findings, the Investigative Authority determined the existence of an essential input consisting of the runways, taxiways, visual aids and platforms that form part of the infrastructure of the International Airport of Mexico City. Accordingly, in order to foster competition conditions in the investigated market, a bundle of remedies was proposed, including recommendations for the amendment of sectoral regulation, the creation of an Independent Coordinator for the management of landing and take-off schedules' allocation, the establishment of a schedule Fund for new entrants, as well as several measures for transparency enhancement, among others.

Additionally, in June 24, 2015, the Investigative Authority of COFECE published in the Official Gazette the initiation of another market investigation in the road cargo transportation market in the State of Sinaloa, to determine the existence of possible barriers to competition. This investigation is in still ongoing.

[10] A writ of *indirect Amparo action* is a native Mexican legal institution. It is a constitutional remedy to obtain relief against violation of human rights committed by an authority or in some cases, even against private entities that unilaterally affect the sphere of human rights of a person.

[11] Article 28; subsection VII, Mexico's federal constitution.

Finally, in January 14, 2016 the Investigative Authority of COFECE published in the Official Gazette the initiation of a market investigation in the production, distribution and commercialization of malt barley seed and grain for beer manufacturing.

VIII. SHOULD COMPETITION AUTHORITIES AROUND THE WORLD HAVE THESE POWERS?

I believe market investigations represent a valuable opportunity for competition authorities to enforce competition principles in markets that appear not to be working well given that these tools enable them to tackle features from any source.

Some critics have established that jurisdictions like Mexico can make use of other tools like market studies in order to obtain a comprehensive understanding of the markets. It is worth distinguishing that market studies, are general reviews that may or may not be provided under the law. However, for authorities it is not only a matter of getting to know how the markets work but to identify how can they be improved and implement measures that represent the best way to achieve that.

Unfortunately, the recommendations arising from market studies are highly valuable yet not mandatory. Thus, I would rather say that the findings of market studies would serve as a complementary tool for the aims of market investigations as the U.K. experience shows. In addition, unlike market studies, market investigations are constrained to look into a relevant economic market and can produce rapid changes that may not be achieved in any other way.

In our legislative process, the legislator considered the concerns expressed by society, including executives, solicitors and scholars, and it came up with a revised version of the bill. Among other changes, the new version included the assumptions under which the market investigations were to be initiated and established the economic agents' opportunity to propose suitable remedies to address the authority's competition concerns. The President of the Republic proposed the legislation with only 14 paragraphs and 625 words and at the end of the day, mostly due to this discussion; the final article is 17 paragraphs and 1191 words long.

From my point of view, the wide range of possibilities that these market investigations offer, allows a flexible approach for authorities to tailor solutions according to specific market circumstances, which make market investigations a desirable tool to have. In the case of structural remedies, I believe this is a step forward because before the reform these remedies, such as divestitures, were only available as a solution to potential anti-competitive effects in mergers or as sanctions of recidivism.

Regarding divestiture powers, it is important to recognize that they are a key power that authorities should use carefully. In the case of Mexico, we are aware of the need to act proportionately to achieve a legitimate outcome so the divestiture of assets is only to be used when other remedies would not be enough to solve the competitive concern.

IX. MARKET INVESTIGATIONS OR TRADITIONAL ANTITRUST ENFORCEMENT TOOLS?

I believe market investigations were conceived to serve as a complementary rather than a competing tool *vis-à-vis* traditional antitrust means. To some extent, market investigations are here to fill in the blanks left by conventional enforcement mechanisms because not every competition failure can be fixed by means of conventional competition tools.

Market investigations are designed to intervene when the identified competition concerns do not seem likely to be "naturally" corrected, or when markets are not working in a competitive manner even in the absence of conducts such as cartels or abuse of dominance. Moreover, as opposed to traditional tools, it is through market investigations that one can identify and correct certain governmental behaviors that may be causing inefficiencies on the workings of the market. As it has been correctly pointed out, this also implies that the investigated conducts include failure to act and that those identified conducts, either acts or failure to act, do not need to be intentional.[12]

Moreover, the fact that a market investigation is being carried out in a certain economic market, does not preclude the possibility of abuse of dominance or cartel investigations to also take place. Meanwhile, the former will be focusing on the overall picture of the market; the later will be targeting misbehavior by the economic agents.

Having said that, the use of either option would depend on the nature of the competition concerns arising from a given market. For instance, in deregulated industries, many of which can be found in the recent economic history of developing countries, market investigations are suitable to correct the inefficiencies that usually derive, not from wrongdoing, but from prior inadequate market structures or legislation.

Regardless of the broad scope of this new tool, it is not intended to be used systematically in every market that presents failures or in lieu of other tools. For instance, there are anticompetitive characteristics in the market that could possibly be resolved on a natural way in the short run or other markets whose anticompetitive characteristics do not affect but a small portion of the whole market.

In any case, it would be preferable to lean towards the tool that is able to provide the most comprehensive solution to the specific competition concerns. When deciding whether to use conventional enforcement tools or market investigations, each country should look at its own circumstances since economies may profoundly differ from one another.

X. CONCLUSIONS

I believe the possibilities of this new tool are overwhelming. As happens with any other powerful tool, the important issue is how you use it.

The experience around the world, especially in the U.K., has proven that it can be an efficient and effective way to tackle the lack of competition in specific markets. The possibility of "surgical interventions" in markets where the lack of competition derives mainly from structural problems that cannot be tackled through traditional competition enforcement tools and where advocacy is not enough to create the necessary pressures for change creates excellent possibilities.

[12] Richard Whish and David Bailey, Competition Law (Oxford: Oxford University Press, 2014), 467.

Competition authorities around the world, particularly in developing countries, can find a way to intervene through these new proceedings to eliminate barriers and create better conditions for more efficient markets in a bold and direct path. The discussion and the political consensus that needs to be created to give the authorities these powers create a beneficial side effect.

Developing countries with a tradition of government owned enterprises, recent privatizations and reregulation are some of the countries that could benefit more from these powers to ensure the new competition settings become efficient and with competition in the newly created markets.