Relevant Cases in Mexico's Jurisdiction for Economic Competition

By Adriana Campuzano[1]

Mexico's history of Economic Competition legislation originates with the first Constitution to rule over the newly independent country, as well as with those that succeeded it. Like the first, these prohibited commercial monopolies, allowing them only for activities reserved exclusively for the State and its enterprises, a prohibition that was bolstered by secondary laws, the first of which can be traced back to 1926.[2] Likewise, we find record of matters settled by the Supreme Court of Justice ("SCJN" in its acronym in Spanish) beginning in the 1930's.[3]

The elaboration of jurisprudence during this time focused on conflicts related to the distance between commercial companies involved in the same business; hoarding of essential goods and facilities; privileged industries and the formation of producer associations.

Years later, with the passing of the country's first Federal Economic Competition Law (1992) and the creation of a specialized autonomous entity to apply the best practices of the time, the courts saw an influx of cases looking to challenge the investigations and fines imposed over alleged monopolistic practices.

Among the first matters resolved by the SCJN over the interpretation and application of the law (2000), was the laying down of foundations for the system. It was upheld, among other matters, that all verification and sanctioning procedures should be carried out at the administrative offices, meaning that (unlike other jurisdictions) they would not be subject to criminal or civil courts; that the interpretation of the law's basic concepts (such as Economic Agent, relevant market, market power, absolute monopolistic practices, etc.) would have to rely on Economic sciences, considering these concepts to have already been adequately defined by the discipline. Finally, the procedure is divided into two phases: a unilateral research phase, similar to a criminal procedure. The other phase, the defense, is where all possible violators would be heard.[4] These matters are relevant, as their directives continue to guide current decisions.

Due to the reforms carried out on the Federal Economic Competition Law, the country's highest court upheld in 2007 that the order for 'dawn raids' at company offices, as well as the setting of penalties involving the sale and divestment of active assets, rights, social projects and their execution, were not matters for the judiciary, but for the regulator itself — which greatly helped to strengthen the Administration.[5]

Years later (2013), the court had the chance to weigh in on a very important matter for the community. The Mexico City government issued a ruling, which restricted self-service supermarkets to areas where small corner-shops were not allowed. According to the decree, this was intended to protect the neighborhoods and traditional public markets. The decree was indicted and the Supreme Court declared it unconstitutional, as it went against free competition by ignoring the preferences of consumers.[6]

The ruling determined that, by stopping self-service establishments from opening in close proximity to these small corner shops, the latter would be allowed to fix prices in the area by exploiting this geographic exclusion. This would in turn harm consumers, who have a right to access the widest possible range of products, selecting them according to their preferences.

Another relevant issue came from the penalties imposed on a world-level soft drinks company and their relative monopolistic practices. The decision by the Supreme Court (2007) was relevant in that it, among other concepts, used the idea of an economic group to attribute the behavior of several companies linked to one another. The concept has been used in other cases, most recently to identify companies that should be subjected to the "preponderance" regime in telecommunications and broadcasting. [7]

The ruling said that an economic group exists when a group of physical or moral entities are found to have compatible commercial and financial interests, so that they coordinate their activities to reach a common goal. That is, they come together to carry out a particular task or in order to satisfy their common commercial and financial interests; that the collective behavior of people must be analyzed, and whether one person can directly or indirectly coordinate the group's activities in the markets and whether they could have decisive influence or control over the group, either *de jure* or *de facto;* that *de jure* control can be applied through share ownership, the ability to manage others or by delegating to others, or by controlling the operation through supply, financing or sales contracts' or the existence of family ties' while the *de facto* control can be the result of other structural factors or interests.

In the same case, the Collegiate Circuit Court that took the case (2008) took on, among other subjects, the raising of the corporate veil in order to establish that Moral entities are instrumental and do not free the people who act through them from the consequences of their actions or from the evidence against them.[8]

The ruling states that, in some cases, the creation of collectives has been used to carry out abuses, simulations or fraud. Therefore, the process known as "lifting the veil from a judicial person or corporate veil", allows us to discover the economic truth behind outward appearances in order to determine if an irregular conduct took place.

Two relevant cases also involved participation by commercial groups, or chambers.

The National Chamber for Cargo Transport was fined, as were several companies in this sector due to relative monopolistic practices, specifically a price-fixing agreement in exchange for services. The taxes on their activities had recently been raised, and so the market leaders, using the chamber in which they sat on the board of directors, developed a strategy to pass on to consumers the impact of this new tax hike. Penalties were also imposed on the company's representatives. The Supreme Court denied their appeal before a Collegiate Court in 2013, establishing clear guidelines on the criteria for the responsibilities of moral and physical entities as part of a collegiate body. Along with them, the court struck down several penalties.[9]

The court's decision analyzed several hypothetical situations that may present themselves when, in engaging in a monopolistic conduct, several individual people are involved, who are in turn representatives of moral or collective entities. For example, it was said that any conduct carried out by individuals acting in representation of moral entities may be held personally responsible, as they cannot alienate themselves from their own will; that violations will not be held as the responsibility of moral entities unless evidence exists to show that their own representation structures have adopted the agreement or decision to perform the offending

conduct and the individual representative is incapable of exercising the Social Will on his or her own; and that both are responsible when the individual executes a collective mandate.

Over the previous year, the high court has been presented with two relevant cases, both of them related to absolute monopolistic practices.

The first of these cases was the product of an investigation into the public tender procedures for certain medications (insulin) to be purchased for the Mexican Institute of Social Security (IMSS, the Federal entity in charge of public healthcare) which uncovered an agreement between several laboratories to manipulate results and prices. The decision (2015) is relevant, as it shows a well-sustained construction of the argument and evidence, introducing an economic analysis as part of the decision for the first time.[10]

The high court held, among other matters, that when dealing with public tender contests for contracts, the following may be considered evidence of collusion: a) A pattern of winning and losing bids; b) Prices offered by winners and losers are somewhat similar; c) There exist economic agents who consistently win the contracts, with noticeable differences to the rest of the competitors; and d) That the entrance of new players reflects a drastic change and reduction of price offerings.

The second case (2015) examines the constitutional validity of the Federal Economic Competition Law through the lens of a case sanctioning the agreements between fresh chicken sellers to lower the sales price of a product. In this case, the high court determined that a monopolistic practice should include all price-fixing agreements, whether they were price increases or reductions.[11]

An extract from the resolution states that, if the Constitution prohibits monopolistic practices and all other acts that represent an unfair, exclusive advantage in favor of one or several persons, to the detriment of the general public, it is clear that this prohibition must include all price-fixing agreements, whether involving increases or reductions, as they both distort the competitive process, eventually affecting the consumer who will not be acquiring these goods and services at a price that reflects real costs and prices.

Finally, revisions by the courts have begun on a group of resolutions related to declarations made by dominant economic agents when working to comply with the provisos of the 2013 reform. The first resolutions are concerned with broadcasting, setting the basis for future cases to consider, where the Constitution had set only a few precise rules for the making of the new competition regime, with its actual development left in the hands of the sector regulator (Federal Telecommunications Institute), which was in turn awarded broad faculties for attracting cases. It was also established that it is the responsibility of the affected parties to demonstrate that these declarations are in violation of applicable norms. [12]

The resolution held that, in terms of economic competition, the essential characteristics of economic groups are units of action, control and coordination, similar to the way that national jurisprudence has, in other areas, recognized that a group of people should be treated as a unit for certain regulatory effects; that is to say, as a focal point for the assignation of rights and obligations.

These cases are relevant, as they illustrate the inclinations of the courts on this subject.

Finally, we could add that, according to previous experience, Mexico's judicial oversight over economic competition matters presents, among others, the following characteristics:

1. It is enforced by the Supreme Court of Justice of the Nation and special tribunals with National jurisdiction, through appeals and other judicial mechanisms for constitutional oversight (un-constitutionality actions and controversies). It is not currently handled by ordinary courts. [13]

For example, one cannot currently indict the actions of the Federal Telecommunications Institute or the Federal Commission for Economic Competition through administrative-criminal courts.

2. It is developed along two dimensions:

Concentrated and diffused constitutional oversight, including in matters relating to the convention on human rights.[14]

Legal oversight, which presupposes a conflict between the actions involved and the secondary laws contained in the Federal Economic Competition Law, other laws and general regulations issued by the regulating agency.

For example, constitutional oversight has been exercised over the ability of the President of the Republic to establish regulations that define the facts and actions that configure a monopolistic practice, as it is considered a legislative matter[15]. Also, legal oversight has been applied on resolutions that define a relevant market to declare and identify an agent with substantial market power.[16]

3. Several terms are analyzed:

General norms (laws, regulations, general technical guidelines issued by the administration, and others.)

Administrative acts (individual resolutions).

4. Related to different fields:

Related to regulation, including all policies for prevention and intervention into the workings of the market, including dominance, essential facilities and barriers. The idea of a Regulator State works as a context for analyzing the modalities imposed upon private activity and individual rights.[17]

Related to the sanctioning authority that includes absolute and relative monopolistic practices, as well as illegal concentrations.

For example, declarations of substantial market power in some telecommunications markets, public offerings by dominant actors, and the sanctions imposed over certain collusion agreements coordinated by professional unions (such as anesthesiologists) have been examined.

5. All elements of the norms and acts are subject to judicial review, although held to different standards: Strict scrutiny is applied when dealing with restrictions on human rights, when there is precise constitutional guidance or when complaints arise of a violation to the principle of equality. Other cases receive only normal scrutiny.[18]

For example, when talking of norms, a strict standard has been applied to clearly determine what constitutes a forbidden conduct;[19] and when dealing with acts, it has used the ordinary revision standard to review the definition of relevant markets when declaring that a particular agent has a substantial power over the telecommunications market, for which the methodology used by the competition authority and its economic tests were analyzed.[20]

6. The legislator's freedom of configuration is recognized in order to achieve the constitutional objectives, and the discretion (including technical discretion) of the regulatory body. However, under both cases, control is to be exercised through a proportionality test, as well as other principles such as reasonableness, equality and non-discrimination.[21]

For example, these parameters have been used to examine the regulator's decision to consider only Open television services, while excluding radio broadcasting services to define a dominant actor in broadcasting.[22]

7. Several assumptions prevail during trial procedures:

The constitutionality of norms, which implies that it is the responsibility of the plaintiff to demonstrate and/or certify their shortcomings.

Presumption of innocence when dealing with administrative sanctions, imposing upon the authority the burden of proof for demonstrating the responsibility of the persons suspected of a violation, through any of the generally accepted means, particularly through the presentation of evidence and analyzing the existence of any alternative explanation to the facts.[23]

The legality of the administrative resolution (unless operating under the previous assumption), according to which the plaintiff must demonstrate its vices and shortcomings.

For example, a case where collusion was detected in the fresh chicken retail market, had the sanction annulled due to a failure to demonstrate that the individual being fined was a representative of the economic agent.[24] Likewise, an agreement between competitors in the commercial coupon market had its own sanctions annulled after demonstrating an alternate explanation for the facts.[25]

As can be seen from this retelling judicial control, wielded by Mexican courts and tribunals, is fully enforced over the economic and competition regulator bodies.

In this sense, the following months are expected to see the SCJN and specialized courts analyzing a number of issues dealing with market dominance, regulatory capabilities and sanctions, as established by the new constitutional framework.

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[1] Judge of the Second Administrative Collegiate Tribunal specialized in Economic Competition, Telecommunication and Broadcasting.

[2] "… While the Constitution of 1857 conceived monopolies as violators of individual freedom in economic matters, the Constitutional assembly of 1917 prohibited them, not only for being contrary to freedom of commerce, industry and employment, but in virtue of their representing an attack against collective goods, for which they were to be controlled… In this sense, the original text showed two main dimensions, in principle, of seeking the defense of individual interests and, later, of public welfare…" Resolution, June 24 2013 in the Acción de Inconstitucionalidad 14/2011, available at: http://200.38.163.178/sjfsist/Paginas/DetalleGeneralScroll.aspx?id=24622&Clase=DetalleTesisEjecutorias&IdTe=200517

[3] The oldest resolution available appearing in the available resolution states that the regulations for the bread industry contradict the constitutional prohibition on monopolies, as they forbid the opening of bakeries within a 300-meter radius of any existing bakery, thus preventing competition. The extract is entitled "Regulations on the Bread Industry"

[4] Resolution extracts are published in the Federal Judicial Weekly, register 191 364, 191 431 y 191 362, under the titles: "COMPETENCIA ECONÓMICA. LA LEY FEDERAL CORRESPONDIENTE NO TRANSGREDE LOS PRINCIPIOS DE LEGALIDAD, SEGURIDAD JURÍDICA Y DIVISIÓN DE PODERES PORQUE CONTIENE LAS BASES NECESARIAS PARA DETERMINAR LOS ELEMENTOS TÉCNICOS REQUERIDOS PARA DECIDIR CUÁNDO SE ESTÁ EN PRESENCIA DE UNA PRÁCTICA MONOPÓLICA", "COMPETENCIA ECONÓMICA. LAS CARACTERÍSTICAS DEL PROCEDIMIENTO ESTABLECIDO EN LA LEY FEDERAL CORRESPONDIENTE, LO IDENTIFICAN COMO ADMINISTRATIVO Y NO COMO CIVIL" y "OMPETENCIA ECONÓMICA. EL PROCEDIMIENTO OFICIOSO DE INVESTIGACIÓN PARA LA PREVENCIÓN Y DETECCIÓN DE PRÁCTICAS MONOPÓLICAS, CONTENIDO EN LA LEY FEDERAL CORRESPONDIENTE, NO VIOLA LA GARANTÍA DE AUDIENCIA", available at http://sjf.scjn.gob.mx/SJFSem/Paginas/SemanarioIndex.aspx

[5] Unconstitutionality complaint 33/2006 presented by the General Attorney and resolved by the plenary sesión of May 10 2007. Available at http://goo.gl/FUpXkv

[6] Unconstitutionality complaint 14/2011 presented by the General Attorney and resolved by the plenary sesión of June 24 2013. Available at http://goo.gl/FEHyMy

[7] Appeal pending 169/2006 on October 24 by the First Chamber of the SCJN, available at http://goo.gl/e15fTL

[8] Appeal pending 479/2006, tried by the Fourth Collegiate Court in Administrative Matters for the First Circuit on June 18th 2008. Available at http://goo.gl/Yu0gFK

[9] Appeal pending 398/2011, tried by the Eighth Collegiate Court in Administrative Matters of the First Circuit on February 14, 2013. Available at http://goo.gl/H4Rzig

[10] Appeal Pending 453/2012 tried by the Second Chamber of the SCJN on April 8 2015, Semanario Judicial de la Federación, Reg. 2 009 655, available at http://goo.gl/cEEFBM

[11] Appeal pending 839/2014 tried by the Second chamber of the SCJN on August 5 2015, Semanario Judicial de la Federación, reg. 2 009 937, available at http://goo.gl/0ZCvFh

[12]Among others, appeal pending 62/2014, tried by the Second Collegiate Court in Administrative matters, specialized in Competition, Broadcasting and Telecommunications, February 19 2015 available at http://goo.gl/243vUP

[13] Constitution, article 28

[14] Semanario Judicial de la Federación. Tesis registro No. 2 010 143 "CONTROL CONCENTRADO Y DIFUSO DE CONSTITUCIONALIDAD Y CONVENCIONALIDAD. SUS DIFERENCIAS." Available at: http://goo.gl/bnPfS0

[15] Semanario judicial de la federación, Thesis no. 180696 "COMPETENCIA ECONÓMICA. EL ARTÍCULO 7o., FRACCIONES II, IV Y V, DEL REGLAMENTO DE LA LEY FEDERAL RELATIVA, AL ESTABLECER QUE DETERMINADAS CONDUCTAS DEBEN CONSIDERARSE COMO PRÁCTICAS MONOPÓLICAS, VIOLA EL PRINCIPIO DE RESERVA DE LEY CONTENIDO EN EL ARTÍCULO 28 DE LA CONSTITUCIÓN FEDERAL", available at http://goo.gl/3JFylo

[16] Appeal pending 90/2015, tried by the First Collegiate Court on Administrative Matters specialized in Competition, Broadcasting and Telecommunications on November 5 2015, Available at: http://goo.gl/d4yPlF

[17] Semanario Judicial de la Federación. Tesis registro No. 2 010 881 "ESTADO REGULADOR. EL MODELO CONSTITUCIONAL LO ADOPTA AL CREAR A ÓRGANOS AUTÓNOMOS EN EL ARTÍCULO 28 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS." Available at: http://goo.gl/A1uJHo

[18] Semanario Judicial de la Federación. Tesis No. 2 007 406 "DERECHO ADMINISTRATIVO SANCIONADOR. EL PRINCIPIO DE LEGALIDAD DEBE MODULARSE EN ATENCIÓN A SUS ÁMBITOS DE INTEGRACIÓN", available at : http://goo.gl/0cUuxw

[19] Semanario Judicial de la Federación. Registro No. 2 009 673 "COMPETENCIA ECONÓMICA. EL ARTÍCULO 9o., FRACCIÓN IV, DE LA LEY FEDERAL RELATIVA, VIGENTE HASTA EL 6 DE JULIO DE 2014, NO VIOLA LOS PRINCIPIOS DE TIPICIDAD Y EXACTA APLICACIÓN DE LA LEY AL DEFINIR LAS CONDUCTAS QUE SANCIONA", available at http://goo.gl/r6xwrl

[20] A.R. 90/2015 tried on November 5 2015 by the First Collegiate Court on Administrative Matters, specialized in economic competition, broadcasting and telecommunications, available at: http://goo.gl/r02dGC

[21] Semanario Judicial de la Federación. Thesis. No. 165 745 "MOTIVACIÓN LEGISLATIVA. CLASES, CONCEPTO Y CARACTERÍSTICAS", available at: http://goo.gl/BgYPXx

[22] Appeal pending 62/2014, tried by the Second Collegiate Court for Administrative Matters specialized in Competition, Broadcasting and Telecommunications on 19 February de 2015, available at: http://goo.gl/245vUP

[23] Semanario Judicial de la Federación. Thesis No. 2 009 671 "COMPETENCIA ECONÓMICA. EL ARTÍCULO 31, PÁRRAFO PRIMERO, DE LA LEY FEDERAL RELATIVA, VIGENTE HASTA EL 6 DE JULIO DE 2014, NO CONTRAVIENE EL PRINCIPIO DE NO AUTOINCRIMINACIÓN" available at: http://goo.gl/d4YdlT

[24] Appeal pending 57/2014 , trie don 26 November 2015 by the Second Collegiate Court for Administrative Matters specialized in Competition, Broadcasting and Telecommunications available at: http://goo.gl/pTU82q

[25] Fiscal Revision 2/2015 tried on 10 March 2016 by the Second Collegiate Court for Administrative Matters specialized in Competition, Broadcasting and Telecommunications available at: http://goo.gl/SiG1Ly