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Challenges To The Effective Implementation Of Competition Policy In Regulated Sectors: The Case Of Telecommunications In Mexico

Oliver Solano, Rafael del Villar** & Rodrigo García-Verdú****

Abstract: This article reviews Mexico's competition law and policy, with particular emphasis on the challenges that the Federal Competition Commission ("CFC") has faced in implementing an effective competition policy. Some of the difficulties analyzed are the loopholes in the current laws, the lack of cooperation between the CFC and other sectoral regulators, and the regulatory arbitrage by market participants. These challenges are then illustrated by the developments in the telecommunications sector. This sector is particularly interesting in the case of Mexico given the overwhelming power of the dominant firm and the overlapping and even conflicting mandates of the different government authorities overseeing the sector. The article concludes with a series of specific policy recommendations aimed at improving the effectiveness with which the competition authority in Mexico implements competition policy.

I. INTRODUCTION

Mexico's competition law and policy were conceived as part of the broader structural reform agenda that began in the mid 1980's to develop an open, market-based economy.¹ Although the Mexican Constitution of 1917

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¹ Other reforms that complemented the adoption of a formal competition policy framework were the liberalization of international trade, foreign investment, and the financial sector, the deregulation of large sectors of the economy, and the scaling back of the

already established some basic competition notions and principles in its Article 28,² effective enforcement did not materialize until the enactment of the Federal Economic Competition Law (*Ley Federal de Competencia Económica*, or “LFCE”), and the creation of the Federal Competition Commission (*Comisión Federal de Competencia*, or “CFC”) in June 1993.³

Despite the progress achieved over the past decade, competition policy has faced various obstacles that have prevented its full implementation in the way it was originally envisioned. For example, certain changes introduced by the judiciary’s interpretation of the competition law have limited the role and scope of the competition authority. Some articles of the LFCE, such as those that prohibit barriers to interstate trade, have been declared unconstitutional by the Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*).⁴ Furthermore, the Supreme Court has also determined that Notaries Public are not economic agents, and thus fall outside of the scope of the LFCE.⁵ Moreover, the courts have restricted

public sector’s participation in the economy through a series of mergers, liquidations, transfers and privatizations of state-owned enterprises. See Gabriel Castañeda, Santiago Levy, Gabriel Martínez & Gustavo Merino, *Antecedentes económicos para una nueva ley de competencia económica*, 60 EL TRIMESTRE ECONÓMICO 237 (1994) (for a discussion of the economic context in which the LFCE and the CFC were introduced).

² Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). The provisions in the current Constitution include the promotion of free competition and the prohibition of monopolies and monopolistic practices. The Constitution also establishes exemptions in the following sectors: postal services, telegraphs, radiotelegraphy, oil and other hydrocarbons, basic petrochemicals, radioactive minerals, nuclear energy, electricity, the issuance of bank notes, the minting of coins, labor unions and cooperative societies, and patent protection and intellectual property rights. In fact, Article 28 of the previous Constitution of 1857 already included the prohibition of monopolies, except for those related to the minting of coins, postal services, and patent protection. Nevertheless, neither Constitution contemplated penalties or sanctions against those agents that violated the law, or established which government authority was responsible for guaranteeing compliance with the law.

³ Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.). Five years later the accompanying regulations to the law were issued. Reglamento de la Ley Federal de Competencia Económica, Diario Oficial de la Federación [D.O.], 4 de Marzo de 1998 (Mex.).

⁴ In particular, Articles 14 and 15 of the LFCE were declared unconstitutional by the Supreme Court of Justice. *Sentencia y voto de minoría relativos a la Controversia Constitucional 1/2001, promovida por el Gobernador Constitucional del Estado de Durango, en contra del Pleno de la Comisión Federal de Competencia Económica*, Diario Oficial de la Federación [D.O.], 10 de Marzo de 2004 (Mex.).

⁵ The Supreme Court stated that: “Although the notary intervenes in the economic activity of the country by charging an honorarium for providing authorized professional services, such honorariums are regulated by the corresponding tariff, and it may not be reputed that providing the services is a commercial transaction, first because the exercise of that activity is forbidden to him by the mentioned Law for the Notaries of the Federal District, and second because article 75 of the Code of Commerce does not repute providing

application of the law in cases of monopolization (relative monopolistic practices).⁶

The implementation of an effective competition policy has also been limited by the lack of cooperation between the CFC and some important sectoral regulators. Another major difficulty has been the abuse by market participants of the *amparo*, an injunction process in the Mexican legislation⁷ designed to safeguard due process, which has been used as a litigation tactic to delay or avoid enforcement of the resolutions of the CFC.⁸ The existence of loopholes in the laws, the absence of cooperation

professional services as a commercial transaction.” AMPARO EN REVISIÓN 586/99, QUEJOSO: CARLOS RUBÉN CUEVAS SENTÍES, Suprema Corte de Justicia de la Nación [S.C.] [Supreme Court], Segunda Sala, October 1999. See also “*Notarios Públicos. No son agentes económicos para efectos de la Ley Federal de Competencia Económica*,” Suprema Corte de Justicia de la Nación [S.C.] [Supreme Court], Primera Sala, Tesis Aislada en Materia Administrativa (1a. XXXI/2002), Semanario Judicial de la Federación y su Gaceta, XV, April 2002; see Rafael del Villar & Francisco Javier Soto Álvarez, *Logros y dificultades de la Política de Competencia Económica en México*, 821 INFORMACIÓN COMERCIAL ESPAÑOLA 107, 119 (2005) [hereinafter ICE] (for a discussion of the far-reaching implications of this decision for economic competition).

⁶ For example, in 2003 the Supreme Court declared that Fraction VII of Article 10 of the LFCE, which describes relative monopolistic practices, was unconstitutional. According to the Supreme Court, “Fraction VII of the contested Article 10 does not accurately specify the framework under which the administrative authority can exercise the faculty it was granted to impose sanctions on those who incur in relative monopolistic practices, because this fraction is limited to indicating generic criteria referring to the competition process and free competition being damaged or obstructed” AMPARO EN REVISIÓN 2589/96, QUEJOSO: WARNER LAMBERT GROUP MEXICO, Pleno de la Suprema Corte de Justicia de la Nación [S.C.] [Supreme Court], Página 140 (Mex.). “*Competencia Económica. El Artículo 10, Fracción VII, de la Ley Federal relativa, al no especificar la conducta sobre la cual recaerá la sanción que prevé, viola las garantías de legalidad y seguridad jurídica previstas en los Artículos 14 y 16 de la Constitución Federal*,” Suprema Corte de Justicia de la Nación [S.C.] [Supreme Court], Pleno, Tesis Aislada en Materia Constitucional y Administrativa (P. XII/2004), Semanario Judicial de la Federación y su Gaceta, XIX, April 2004 (Mex.). “*Suspensión Provisional. Es procedente contra la ejecución de las multas administrativas impuestas por la Comisión Federal de Competencia para sancionar las conductas señaladas en el Artículo 10, Fracción VII, de la Ley Federal de Competencia Económica, en relación con el Artículo 7º. Fracción V, de su Reglamento*,” Suprema Corte de Justicia de la Nación [S.C.] [Supreme Court], Segunda Sala, Jurisprudencia en Materia Administrativa (2a./J. 11/2003), Semanario Judicial de la Federación y su Gaceta, XVIII, March 2003 (Mex.). For more details, see ICE, *supra* note 5, at 120.

⁷ Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [D.O.], 10 de Enero de 1936 (Mex.).

⁸ An example is the resolution by the CFC at the end of 1997 declaring that Teléfonos de México, or Telmex, the largest telecommunications firm in Mexico, has substantial market power in five telecommunications markets. The courts granted an injunction to Telmex and ordered the CFC to correct the procedure. Once the CFC had corrected the procedure, Telmex requested a new injunction which the courts granted. Afterwards, Telmex presented a third injunction which was also granted by the courts. These three injunctions deal with

between government agencies, and the regulatory arbitrage by market participants to exploit them have undermined the effectiveness of competition policy in Mexico.

This article contributes to the debate on competition policy in developing countries in general, and in Mexico in particular, by analyzing some of the difficulties and challenges the competition authority in Mexico has faced. Some of these difficulties are illustrated using the telecommunications sector as an example. We believe this is a particularly interesting sector given the enormous economic power of Telmex, the dominant telecommunications firm in the country, the overlapping and even conflicting mandates of the different government authorities overseeing this sector, and the rapid technological change that has characterized it in recent decades. Furthermore, the telecommunications sector has been at the forefront of international trade disputes between Mexico and the United States, in the context of the commitments assumed by both countries to liberalize their services sectors as members of the World Trade Organization ("WTO").

The rest of the article provides an overview, analysis, and proposed solution to the challenges that the Mexican telecommunications industry presents. Section II provides an overview of the competition framework in Mexico, including a discussion of some of the difficulties faced by Mexico's competition authority. Section III then illustrates the particular challenges faced in the implementation of an effective competition policy in the telecommunications sector. Finally, section IV summarizes the main findings and presents some specific policy recommendations to improve the effectiveness of competition policy in Mexico.

II. AN OVERVIEW OF MEXICO'S COMPETITION FRAMEWORK

The Federal Competition Commission ("FCC") is the administrative agency in charge of the monitoring, surveillance, and protection of the competition process in Mexico. The competition regime's general policy objectives are to protect the competition process and encourage free competition by preventing and eliminating monopolies, monopolistic practices, and any other activities that would oppose or hinder the efficient performance or operation of markets for goods and services.⁹ The CFC has

procedural matters without going into substantive issues. Thus, after more than eight years of litigation it is still unclear what the result of the resolution will be. See below for a detailed discussion of this process; see Sheoli Pargal, *Regulatory Environment for Private Sector Participation in Infrastructure, in MEXICO. A COMPREHENSIVE DEVELOPMENT AGENDA FOR THE NEW ERA* (Marcelo Giugale et al. eds., 2001) (for a discussion and recommendations regarding the *amparo* process); see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *COMPETITION LAW AND POLICY: REVIEW OF MEXICO* (2004) (for the review of Mexico's competition law and policy by the OECD's Competition Committee).

⁹ Artículo 2, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], as

a number of tools to achieve these objectives. In order to prevent monopolies, the CFC has two main tools. First, it has the ability to authorize or reject proposed mergers, and to give assessments, opinions and market determinations to sectoral authorities.¹⁰ Second, it is empowered to investigate¹¹ and sanction anti-competitive behaviors, including absolute monopolistic practices such as cartels, as well as relative monopolistic practices having exclusionary effects.¹²

The CFC has a general and overarching mandate to protect and promote the competition process in order to foster economic efficiency.¹³ While this role is implicit in all economic activities, some areas of the economy, especially in regulated sectors, call for the explicit participation of the CFC.¹⁴ Table 1 shows some of the main sectors and policy areas,

amended, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

¹⁰ Artículos 16–22, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.). These articles define the merger review process of the CFC and the market concentration thresholds for obligatory notification to the CFC. The merger review process is similar to the one followed by the competition authorities of most OECD countries. Article 24, Fractions IV, V, and VI grant the CFC authority to issue non-binding opinions on competition matters in regards to drafts of new laws and regulations as well as of administrative programs and acts.

¹¹ Artículo 24, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

¹² Artículos 35–38, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

¹³ “*Esta ley tiene por objeto proteger el proceso de competencia y libre concurrencia, mediante la prevención y eliminación de monopolios, prácticas monopolísticas y demás restricciones al funcionamiento eficiente de los mercados de bienes y servicios.*” Artículo 2, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.). (“This law has the objective of protecting the competition process and free concurrence by means of the prevention and elimination of monopolies, monopolistic practices, and other restrictions on the efficient operation of markets for goods and services.”)

¹⁴ A number of sectoral laws contain explicit references to the LFCE and to the CFC. According to these laws, the CFC can object to the participation of economic agents in public auctions and privatizations when it considers that such participation would impose significant risks to competition. Moreover, these laws establish that the CFC can issue determinations of substantial market power, which enable sectoral authorities to impose tariffs, quality and information regulations. “*La Comisión tendrá las siguientes atribuciones: . . . IV.- Opinar sobre los ajustes a los programas y políticas de la administración pública federal, cuando de éstos resulten efectos que puedan ser contrarios a la competencia y la libre concurrencia; V.- Opinar, cuando se lo solicite el Ejecutivo Federal, sobre las adecuaciones a los proyectos de leyes y reglamentos, por lo que conciernen a los aspectos de competencia y libre concurrencia; VI.- Cuando lo considere pertinente, emitir opinión en materia de competencia y libre concurrencia, respecto de leyes, reglamentos, acuerdos, circulares y actos administrativos, sin que tales opiniones tengan efectos jurídicos ni la Comisión pueda ser obligada a emitir opinión[.]*” Artículo 24, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación

along with the relevant sectoral agencies, where the CFC plays a fundamental role.

TABLE 1: MAIN SECTORS AND POLICY AREAS OF THE FEDERAL COMPETITION COMMISSION

Sector/Policy Area	Relevant Agencies / Bodies of the Sector or Area
Telecommunications	<ul style="list-style-type: none"> • Federal Telecommunications Commission (<i>Comisión Federal de Telecomunicaciones</i>, or “COFETEL”) • Ministry of Communications and Transportation (<i>Secretaría de Comunicaciones y Transportes</i>, or “SCT”).
Transportation (including aviation, seaports, and road and rail transport)	<ul style="list-style-type: none"> • Ministry of Communications and Transportation (<i>Secretaría de Comunicaciones y Transportes</i>, or “SCT”)
Electricity and gas	<ul style="list-style-type: none"> • Energy Regulatory Commission (<i>Comisión Reguladora de Energía</i>, or “CRE”)
International Trade	<ul style="list-style-type: none"> • Ministry of Economy, Vice-Ministry of International Trade Negotiations (<i>Secretaría de Economía, Subsecretaría de Negociaciones Comerciales Internacionales</i>) • Ministry of Economy, International Trade Practices Unit (<i>Secretaría de Economía, Unidad de Prácticas Comerciales Internacionales</i>, or “UPCI”) • Foreign Trade Commission (<i>Comisión de Comercio Exterior</i>, or “COCEX”)
Financial (including banking, securities, insurance and sureties, and pension funds)	<ul style="list-style-type: none"> • Central Bank (<i>Banco de México</i>, or <i>Banxico</i>) • Ministry of Finance (<i>Secretaría de Hacienda y Crédito Público</i>, or “SHCP”) • National Banking and Securities Commission (<i>Comisión Nacional Bancaria y de Valores</i>, or “CNVB”) • National Insurance and Sureties Commission (<i>Comisión Nacional de Seguros y Fianzas</i>, or “CNSF”) • National Commission of the System of Savings for Retirement (<i>Comisión Nacional del Seguro de Ahorro para el Retiro</i>, or “CONSAR”) • Institute for the Protection of Bank Savings (<i>Instituto para la Protección del Ahorro Bancario</i>, or “IPAB”) • National Commission for the Protection and Defense of the Users of Financial Services (<i>Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros</i>, or “CONDUSEF”)
Consumer Protection	<ul style="list-style-type: none"> • Federal Consumer Protection Agency (<i>Procuraduría Federal del Consumidor</i>, or “PROFECO”)

[D.O.], 24 de Diciembre de 1992 (Mex.).

Regulatory Improvement	• Federal Regulatory Improvement Commission (<i>Comisión Federal de Mejora Regulatoria</i> , or “COFEMER”)
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The competition-related provisions in many of these sectors' laws give the CFC important roles. Furthermore, only the CFC has the authority to apply the competition law. Thus, certain rules of involvement between the CFC and these agencies are necessary. The existing sectoral laws contemplate the various types of interactions.¹⁵

First, the CFC is required to make an assessment of the competition conditions or substantial market power in certain regulated sectors before the regulator can impose price controls (as well as other obligations, such as quality and information disclosure requirements).¹⁶ More specifically, in the road, air, sea, and rail transport sectors, the CFC must determine if there is an absence of effective competition in the market, while in the telecommunications sector it must determine if an economic agent has substantial market power. In practice, this type of mechanism presents some problems:

1. This mechanism causes considerable delays, since the CFC and the sectoral authorities' decisions are sequential. Thus, it may unnecessarily block sectoral authorities from imposing a pro-competitive regulation in a timely manner since they have to wait until after the CFC has come up with its resolution;
2. As explained below, this mechanism multiplies the opportunities to delay or avoid enforcement by contesting the authorities' resolutions in the courts using the *amparo* or injunction process;
3. Authorities have to disclose their intention of regulating or affecting

¹⁵ See, e.g., *Ley Federal de Telecomunicaciones* [Federal Telecommunications Law], *Diario Oficial de la Federación* [D.O.], 7 de Junio de 1995 (Mex.); *Ley de Caminos, Puentes y Autotransporte Federal* [Federal Roads, Bridges, and Transport Law], *Diario Oficial de la Federación* [D.O.], 22 de Diciembre de 1993 (Mex.); *Ley de Aeropuertos* [Airports Law], *Diario Oficial de la Federación* [D.O.], 22 de Diciembre de 1995 (Mex.); *Ley de Navegación* [Water Transport Law], *Diario Oficial de la Federación* [D.O.], 19 de Julio de 1993 (Mex.); *Ley de Aviación Civil* [Civil Aviation Law], *Diario Oficial de la Federación* [D.O.], 12 de Mayo de 1995 (Mex.); *Ley Reglamentaria del Servicio Ferroviario* [Train Transport Service Law], *Diario Oficial de la Federación* [D.O.], 12 de Mayo de 1995 (Mex.); *Ley Federal sobre Metrología y Normalización* [Federal Metrology and Standards Law], *Diario Oficial de la Federación* [D.O.], 1 de Julio de 1992 (Mex.); *Ley de Sistemas de Ahorro para el Retiro* [Retirement Savings Systems Law], *Diario Oficial de la Federación* [D.O.], 23 de mayo de 1996 (Mex.); *Ley de Instituciones de Crédito* [Credit Institutions Law], *Diario Oficial de la Federación* [D.O.], 18 de Julio de 1990 (Mex.).

¹⁶ The LFCE establishes the elements that the CFC has to take into account for determining whether or not there is substantial market power. See Artículos 12, 13 y 31, *Ley Federal de Competencia Económica* [L.F.C.E.] [Competition Law], as amended, *Diario Oficial de la Federación* [D.O.], 24 de Diciembre de 1992 (Mex.).

entrenched interests before it is necessary; and

4. There is no guarantee that a CFC resolution will trigger the expected or anticipated action by the sectoral authority.

Second, in several government processes and procedures, including privatizations, tenders, auctions, permits, concessions, and licenses, the participants or applicants must obtain a favorable opinion from the CFC as a clearance prerequisite.¹⁷ If the CFC determines that competition in a market could be negatively affected, it may refuse the applicants' request or impose certain conditions for its authorization.

In terms of remedying anticompetitive mergers (e.g., derived from privatizations, auctions, permits, concessions, or licenses), the CFC has both structural (e.g., divestiture of assets)¹⁸ and behavioral remedies (i.e., remedies that regulate the agent's behavior).¹⁹ To complicate matters further, the responsibility for merger reviews is sometimes shared between the CFC and sectoral authorities. Additionally, it is sometimes unclear which authority has the final say. This is the case, for example, with mergers in the banking sector, where the CFC, the Ministry of Finance (*Secretaría de Hacienda y Crédito Público*), the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*), and the Central Bank (*Banco de México*) are involved in the review process.

The CFC has weak structural remedy capacities by law and thus has probably resorted excessively to behavioral remedies, which are difficult to devise and administer and relatively easy to evade.²⁰ With regard to monopolistic practices, the CFC has no structural remedy capacities by law. This means that the CFC has limited power to solve cases of significant abuse of dominance incurred by single economic agents. In such cases behavioral remedies are unlikely to alter the incentives of the agent and thus

¹⁷ For example, this clearance procedure is established in the Federal Telecommunications Law. The CFC may object that certain economic agents participate in spectrum auctions. See Artículos 16–22, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], as amended, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

¹⁸ The CFC has conditioned the approval of certain mergers on the divestiture of assets. This was the case, for example, in the merger between Kimberly Clark and Scott Papers in 1996. See del Villar & Soto Álvarez, *supra* note 5, for details. See also Artículos 19 y 35, Fracción II, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], as amended, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

¹⁹ For example, in 1996 the CFC approved the partial merger between the two major airlines of the country, Aeroméxico and Mexicana, but it imposed significant restrictions to the joint operations of the airlines. See the discussion below. See Artículos 35–38, Fracción II, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], as amended, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

²⁰ For example, several firms, including Telmex, have successfully avoided paying the fines imposed by the CFC by appealing the rulings through the courts.

unlikely to eliminate the relative monopolistic practice. In other countries, such as the United States, the antitrust agency can ask for structural remedies and has the leverage to negotiate a settlement which gives the prosecutor the tools to solve the problem.

In addition to the above, the CFC can issue opinions and recommendations regarding the effects on competition of proposed and existing laws, regulations and other government acts, such as the terms of reference for privatizations and auctions.²¹ These opinions and recommendations may be issued at the request of the Federal Executive on its own initiative, or as part of the Regulatory Impact Assessment procedures undertaken by the Federal Regulatory Improvement Commission (*Comisión Federal de Mejora Regulatoria*, or “COFEMER”). Unfortunately, in many cases the opinions and recommendations of the CFC are not binding and can be ignored by the sectoral authority. As a result, the power of the CFC to remedy anti-competitive outcomes is limited. Therefore, it would be desirable that the opinions and determinations of the CFC be binding for the relevant sectoral authority so that anti-competitive situations in regulated sectors can be effectively solved.

The above problem can be aggravated by the fact that in many cases the policy objectives pursued by the sectoral regulators may not necessarily coincide, or even be compatible, with those of the CFC. Indeed, while the CFC must always seek to promote competition and economic efficiency, sectoral regulators may pursue other objectives.²² As a result, the relationship between the CFC and these sectoral agencies has not always been smooth and there have actually been cases in which opinions strongly differ or where the recommendations of the CFC have been ignored.

For example, in the air transport sector the CFC found several regional markets (flight segments between city pairs) where there was no effective competition. It issued a recommendation to the sectoral regulator, the *Secretaría de Comunicaciones y Transportes* (“SCT”), after it was notified of the creation of Cintra, a holding company of the two largest airlines in the country. The CFC approved the merger in 1996, but it reserved the right to demand that the companies be sold separately if the merger proved to be anti-competitive after four years. The privatization into separate companies

²¹ Artículo 24, Fracciones IV, V y V, Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

²² Some sectoral regulators may be concerned primarily with the effective provision of a given service, the stability of a given sector or the attainment of certain sectoral growth targets, and not necessarily with the efficiency with which the sector operates. For example, in the telecommunications sector the authorities argued for years that cross subsidies from long distance to local service were needed to increase teledensity. This policy was designed in a way that inhibited local service competition.

took place only at the end 2005 in a process in which one of the two airlines (Mexicana) was sold to the Mexican hotel chain operator Posadas de México, which also made an unsuccessful bid for the other major airline (Aeroméxico).

Another example is the case of Telcel, Mexico's largest provider of cellular phone services. This company is controlled by the same group that controls Teléfonos de México, or Telmex, the dominant telecommunications operator in the country.²³ In 2001, Telcel made an application for permission to provide long distance services. Despite the CFC's negative opinion, the sectoral regulator, the Comisión Federal de Telecomunicaciones ("COFETEL"), authorized Telcel's application without providing an adequate explanation as to why the CFC opinion was overruled.²⁴ Since then, Telcel has increased its market share to more than 75% of subscribers, making it by far the largest mobile operator in Mexico.²⁵

In other cases, like that of the railroad sector, the lack of an adequate sectoral regulatory framework has led to inefficient market outcomes. In the railroad sector, for example, the absence of a strong and independent regulatory agency and the lack of effective regulatory measures have created problems with interlinear traffic and access to the railroad network.²⁶ In particular, the two major operators of the concessioned railroad networks have failed to reach an agreement even eight years after the privatizations have concluded.²⁷ The weak regulatory framework has not given the sectoral authorities sufficient tools to break the stalemate and solve the dispute.

Table 2 shows other opinions and recommendations made by the CFC, some of which have been accepted by the sectoral regulators.

²³ In December 2004, Telmex stated that its competitors did not have a significant share of the market for fixed-line local service. In particular, Telmex had a market share of 79.4% in domestic long distance service in the 200 cities opened to pre-competition (100% elsewhere) and 77.6% in international long distance service measured on the basis of total number of billed minutes in the 200 cities open to competition (100% elsewhere). See Telmex, Annual Report (Form 20-F).

²⁴ See Informe Anual de Competencia Económica, Comisión Federal de Competencia Económica [Annual Report of the Federal Competition Commission] (2001).

²⁵ In December 2004, the market share of Telcel was 77% in pre-paid plans and 74% in post-paid plans. Telcel's share of the Mexican cellular market was approximately 75% in 2004. See América Móvil, Annual Report (Form 20-F) (2004).

²⁶ The sector is still under the direct regulation of the Ministry of Communications and Transport.

²⁷ See ICE, *supra* note 5, at 112.

**TABLE 2: EXAMPLES OF OPINIONS AND RECOMMENDATIONS
OF THE FEDERAL COMPETITION COMMISSION AND THEIR
EFFECTIVENESS**

Case	CFC Opinions	Effectiveness
Airports: Access to Airport Services. (1999–2000)	There was no reasonable condition of competition in the provision of these services. CFC recommended tariff regulation.	Tariff regulation was imposed on privatized airport controlling groups
Railroads: Extent of competition in grain transport North-Center of the country. (2003–2004)	Effective competition did not exist.	Ferromex appealed the opinion and CFC reversed its opinion.
Ports: Granting access to ICAVE to public docks in Veracruz (2003)	It did not find justification to give access to ICAVE since it controls its own dock in the port.	Denied access for ICAVE.
Energy: Liquefied Petroleum Gas (“LPG”) regulation. (2003–present)	Opinion against regulations that facilitate price arrangements among competitors.	The LPG regulation has not been enacted due to the incapacity to reach an agreement among the parties.
Energy: Natural Gas regulation. (2003)	Opinion against limiting permissions for Natural Gas transport of own use.	CFC Opinions were included in regulation.
Granting second cable television concessions. (2003–2005)	Favorable opinion to the granting of second concessions.	The second concessions were given.
Tariffs in fix to mobile telecommunications and Tariffs in mobile to mobile long distance calls. (2005–present)	Diverse conditions must be established: congruence between intra-network tariffs and interconnection tariffs. Recommends eliminating distorting conditions and engineer a reduction of interconnection tariffs.	At the moment no decision has been announced by the SCT-COFETEL authority.
Wireless services to support Broadband Internet Access. (2005–present)	Recommends classifying the 5.7 GHz band for “free use” to promote the competitive provision of Broadband Internet services.	The SCT has announced that it will revert its initial decision and classify it as a “free use” band.

Another instrument being used is coordination agreements between the CFC and diverse state governments and sectoral authorities. The CFC has entered into coordination agreements with several states, municipalities and

sectoral regulators.²⁸ However, it has not been able to reach such agreements with some of the most important regulators, like COFETEL, the telecommunications sectoral regulator whose policies favor market planning and who simply consider that they may continue to operate as before without CFC intrusion.²⁹

Finally, an additional problem that hinders enforcement and compliance is the litigious abuse of the *amparo* process. Similar to an injunction, an *amparo* (literally meaning shelter or protection) is a judicial review procedure whereby a complainant can ask for the reparation, suspension, or annulment of an act of government authority that is deemed to violate the complainant's constitutional rights (e.g., due process).³⁰ Although the *amparo* is a necessary mechanism to maintain a constitutional system of checks and balances, the reality is that this procedure has more often been used by companies under investigation as a mere litigation tactic to delay or avoid enforcement of the resolutions of the CFC.³¹

Currently, an *amparo* can be granted by any federal civil judge.³² As a result, the affected companies can present *amparo* cases to judges that have a limited background in the issues being discussed, let alone adequate knowledge of the economic issues which are necessary to understand competition cases. One of the potential policy actions to remedy this situation is the creation of courts within the judicial branch that would concentrate on economic competition cases in which specialized judges and

²⁸ Cooperation agreements have been signed with 16 of the 32 states and with the *Centro Nacional de Desarrollo Municipal* (National Center for Municipal Development). With sectoral regulators, the Federal Competition Commission has so far signed cooperation agreements with the *Comisión Federal de Mejora Regulatoria*, or COFEMER (Federal Regulatory Improvement Commission), the *Procuraduría Federal del Consumidor*, or PROFECO (Consumer Protection Agency), the *Comisión Reguladora de Energía*, or CRE (Energy Regulatory Commission), and the *Unidad de Prácticas Comerciales Internacionales, Secretaría de Economía* (International Trade Practices Unit, Ministry of Economy).

²⁹ In addition to the above mentioned agreements with national authorities, the Government of Mexico has signed agreements related to the application of competition laws with the United States and Canadian Governments. The CFC has also signed agreements with the *Fiscalía Nacional Económica* (National Economic Prosecutor) of Chile and with the Fair Trade Commission of the Republic of Korea.

³⁰ According to the former President of the Supreme Court, Genaro Góngora Pimentel, the effects of the *amparo* are to be understood as not limited to those established by law. The term *amparo* includes authorities of all those persons that have public force by virtue of the circumstances, be they legal or de facto and are able to act not as simple individuals but as individuals that exercise public acts. Thus, the *amparo* proceeds not only against legitimately constituted authorities, but also against mere de facto authorities.

³¹ See, e.g., *supra* note 8.

³² Mexico has local and federal civil judges. Federal civil judges are the ministers of the Supreme Court, the magistrates of the Circuit Collegiate Tribunals and the judges of the District Courts.

magistrates could help limit the use of the *amparo* process only to those cases with sufficient merits.³³

III. THE CASE OF THE TELECOMMUNICATIONS SECTOR

Similar to other infrastructure sectors, telecommunications plays a fundamental role in the day-to-day operations of nearly all industries. Telecommunications services are especially important with respect to the access to the network and infrastructure that are necessary for other related industries and companies to operate. For example, in today's world one cannot imagine doing business without broadband access to the Internet. But in order for companies to provide access services to the Internet and Internet-based telephony to end consumers and other businesses, they need to have access to the underlying telecommunications network.

In Mexico, access to the basic telecommunications network by potential providers has been constrained by the need to obtain concessions from the Ministry of Communications and Transportation ("SCT").³⁴ In several cases, the granting of concessions has been delayed for years. For example, at the end of the 1990s and beginning of the 2000s, a group of important cable TV companies requested permission to provide telephony services.³⁵ To this date, the SCT has not allowed them to provide this important service to their customers, supporting the monopolistic position of Telmex in a market that is fifteen times larger than the cable TV market.

Such barriers to entry to these markets keep other service providers out and consequently raise the prices for services to end consumers and other businesses. Naturally, this increases the cost structures of firms that rely on these services for their operations, which in turn makes them less competitive. In Mexico, although prices for telecommunications services have decreased over the past decade, they still remain among the highest relative to other OECD member countries, as Table 3 shows.

³³ See, e.g., Pargal, *supra* note 8.

³⁴ See Ley Federal de Telecomunicaciones [Federal Telecommunications Law], art. 11, Diario Oficial de la Federación [D.O.], 7 de Junio de 1995 (Mex.).

³⁵ After not being allowed to provide telephony services directly to end users but only permitted to lease capacity to authorized telephony operators, in 2004 the *Cámara Nacional de Televisión por Cable* or Canitec (National Chamber of Cable Television) asked the opinion of the CFC as to the provision of voice services through Cable TV networks. In its opinion, the CFC stated that Cable TV networks should also be allowed to offer telephony services as quickly as possible and with the smallest regulatory burden as a tool to develop the competition process in fixed telephony services. Letter from Eduardo Perez Motta, President of the CFC, to Pedro Cerisola, Minister of Communications and Transport (Oct. 31, 2005), available at <http://www.cfc.gob.mx/contenedor.asp?P=Results.asp?txtDir=http://xeon2/cfc01/Documentos/Esp/Resoluciones> (Opinion 3 of the Telecommunications Convergence Letter).

TABLE 3: COMPARISON OF TARIFFS IN TELECOMMUNICATIONS SERVICES AMONG THIRTY OECD COUNTRIES³⁶

Concept	Mexico's Position
Residential ³⁷	4 th most expensive
Business ³⁸	Most expensive
International	Most expensive
Mobile ³⁹	5 th most expensive
Enlaces	7 th most expensive
Internet Broadband DSL ⁴⁰	Most expensive
Internet Broadband	3 rd with lowest penetration

Many of the shortcomings in the performance of the telecommunications sector can be traced back to the privatization process of Telmex. For example, Telmex was privatized in 1990 before the establishment of an adequate regulatory framework or a sectoral regulator. In fact, it was not until 1996 that the Federal Telecommunications Commission ("COFETEL") was established, and even then it was granted limited autonomy and weak regulatory powers.⁴¹

Another problem with the privatization process was that Telmex was auctioned off in order to maximize the revenues from its sale obtained by the government, as was the case with many other state owned enterprises. In exchange, Telmex was granted in its "Title of Concession" certain rights and obligations to build, maintain, operate, and commercially exploit the public telephone network.⁴² The government imposed several targets, obligations, and performance requirements on Telmex, but granted it six years of monopoly rights in the long distance market.⁴³ In hindsight, it was

³⁶ These comparisons are made by taking prices converted into U.S. dollars and adjusted for purchasing power parity. They are based on bundles or packages which have been defined by consensus among OECD member countries since 1990. The packages are updated periodically by the OECD, and the information on which the comparison is based is collected by Teligen, a private research specialist in the telecommunications industry. Source: OECD, Communications Outlook 2005.

³⁷ This comparison refers to residential packages as defined by the OECD, which include local calls, long-distance calls and calls to mobile phones.

³⁸ This comparison refers to packages that include local calls, long-distance calls and calls to mobile phones.

³⁹ This comparison refers to OECD's medium-use basket packages, which include incoming and outgoing calls.

⁴⁰ This is a comparison of the best plans in each country.

⁴¹ For instance, the Minister of Communications and Transport can remove COFETEL commissioners at his discretion.

⁴² *Modificación al Título de Concesión de Teléfonos de México, S.A. de C.V., as amended*, Diario Oficial de la Federación [D.O.], 10 de Diciembre de 1990 (Mex.).

⁴³ *Id.* at Condition 5-4.

a serious policy mistake to have given such protection to an entrenched state-owned monopoly.

When Telmex's monopoly rights ended, the long distance market was gradually opened to new entrants between 1996 and 1997.⁴⁴ However, this market was governed by a set of International Long Distance Rules ("ILD Rules")⁴⁵ which were drafted in a way that sustained Telmex's market power despite the entry of new operators. Indeed, pursuant to the ILD Rules, international gateway operators (i.e., authorized long-distance service licensees) had to apply the same "uniform settlement rate" to all long-distance calls to or from any country, regardless of which operator originated or terminated such calls.⁴⁶

The uniform settlement rate for each country was set by the long-distance service licensee (through negotiations with the operators) that had the largest outgoing long-distance market share for that country during the previous six months.⁴⁷ This rule implied that Telmex in effect set the prices for the whole sector. Under the principle of "proportionate return," incoming calls (or associated revenues) from a foreign country had to be distributed among international gateway operators in proportion to each operator's market share in *outgoing* calls to that country.⁴⁸ The enforcement of these ILD Rules resulted in new firms being charged high interconnection fees, which were "negotiated" by the already dominant and well-established incumbent firm.

The Federal Telecommunications Law empowers the COFETEL to impose specific obligations on a firm which has been declared by the CFC to have market power in a relevant market in terms of the Federal

⁴⁴ The Ministry of Communications and Transportation, or SCT, granted long distance concessions to Alestra (a joint venture of AT&T), Avantel (a joint venture of MCI), and others at the end of 1995. As is well known, MCI eventually filed for bankruptcy in the United States and AT&T was taken over by SBC.

⁴⁵ The International Long Distance Rules were published in December 1996 and entered into effect in January 1997. See Reglas de Larga Distancia Internacional [R.L.D.I.], *as amended*, Diario Oficial de la Federación [D.O.], 11 de Diciembre de 1996 (Mex.) also available at http://www.cft.gob.mx/cofetel/html/9_publica/reglas/11dic96.shtml.

⁴⁶ *Id.* at R.23 (establishing the uniform settlement rate); *id.* at R.2, fraction 12 (defining uniform settlement rate).

⁴⁷ *Id.* at R.13-21 (establishing that the determination of the settlement rates is by the largest operator in Mexico).

⁴⁸ Such a practice was implemented by the Federal Communications Commission of the United States to protect U.S. international carriers and consumers from whipsawing behavior of foreign monopolists. Whipsawing is a form of anticompetitive behavior that involves the ability of foreign carriers to obtain unduly favorable terms and conditions from U.S. International Service providers, by setting competing carriers against one another. Protection From Whipsawing on the U.S.-Philippines Route, 68 Fed. Reg. 31 (Feb. 14, 2003), available at <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-3700.pdf#search='whipsawing'>.

Competition Law.⁴⁹ These obligations may include fixing rates (including price controls), and imposing quality of service and information disclosure requirements. However, the practical problem is that the CFC has no role in the design or content of the subsequent regulations. These regulations are the sole responsibility of the COFETEL. These problems are aggravated by the abuse of the *amparo* system described above.

In December 1997, the CFC identified five relevant markets where Telmex was dominant: local telephony, local access (interconnection), national long distance, international long distance, and inter-urban transport (resale of long distance).⁵⁰ Despite this declaration, which in theory would empower the regulator to take action against Telmex, COFETEL has been unable or unwilling to impose the obligations which were issued by a previous administration.

In addition, Telmex has avoided any sanctions by repeatedly appealing the decision. The declaration was initially appealed before the CFC using the reconsideration procedure, but the CFC confirmed its resolution in 1998. Nevertheless, Telmex still filed a number of *amparos* to delay the enforcement of this decision. COFETEL eventually issued a resolution establishing certain obligations for Telmex in 2000, but Telmex appealed this resolution through another *amparo*, which delayed the entry into force of these obligations.⁵¹

Subsequently, in 2001, a judicial court annulled the original resolution of the CFC. In 2002, as a consequence of this ruling, Telmex was able to obtain the annulment of all acts derived from the original resolution, including COFETEL's resolution. Because of this, the CFC had to restart the original proceedings in order to correct the deficiencies that the judicial court had found. When the CFC finally issued a new resolution declaring Telmex's dominance, Telmex once again challenged this resolution and eventually won the *amparo* in May 2004.⁵² In August 2004, the CFC issued yet another resolution, which was likewise appealed by Telmex.⁵³

⁴⁹ See Ley Federal de Telecomunicaciones [Federal Telecommunications Law], as amended, Art. 63, Diario Oficial de la Federación [D.O.], 7 de Junio de 1995 (Mex.).

⁵⁰ Comisión Federal de Competencia, GACETA Año 4, num 10, Mayo-Agosto 2001, available at <http://www.cfc.gob.mx/contenedor.asp?P=Results.asp?txtDir=http://xeon2/cfc01/Documentos/Esp/Comunicación>.

⁵¹ See *Resolución Administrativa por la que la Secretaría de Comunicaciones y Transportes, por Conducto de la Comisión Federal de Telecomunicaciones, establece a Teléfonos de México, S.A. de C.V., obligaciones específicas relacionadas con tarifas, calidad de servicio e información, en cu carácter de concesionario de una red pública de telecomunicaciones con poder sustancial de mercado en cinco mercados relevantes, de acuerdo con el Artículo 63 de la Ley Federal de Telecomunicaciones*, Comisión Federal de Telecomunicaciones, 8 de septiembre de 2000.

⁵² See Ley de Amparo, *supra* note 7, at RA 721/2000.

⁵³ See *id.* at RA 493/2003.

Thus, it is only when the resolution by the CFC becomes firm and enforceable that COFETEL can be legally empowered to issue its new resolutions to address Telmex's anti-competitive behavior. Nevertheless, it has become clear that Telmex's strategy has been to appeal and challenge any resolution that threatens its dominant position in the market. More than an enforcement problem, this has become a structural and regulatory problem because the legal framework does not facilitate the job of the CFC.

Because of the above impasse, presumably at the request of those firms in the United States whose interests were being affected (i.e., the former Mexican affiliates of AT&T and MCI-Worldcom), in 2000 the United States requested consultations with Mexico concerning certain measures that were deemed to be inconsistent with Mexico's General Agreement on Trade in Services ("GATS") commitments and obligations on telecommunication services. While consultations took place between 2000 and 2001, the parties were unable to reach an agreement; thus a WTO Panel was established in 2002 to address the issue. The WTO Panel reviewing this case issued its Report on April 2004.⁵⁴ Although some of the claims by the United States were dismissed, the Panel resolved that Mexico had failed to comply with some of its GATS commitments.⁵⁵

With respect to the relevant competition issues, the following findings were of particular importance: (i) Mexico failed to ensure that a major supplier (i.e., Telmex) provided interconnection to U.S. suppliers at cost-oriented rates for the cross-border supply; and (ii) Mexico did not take "appropriate measures" to prevent anti-competitive practices because it maintained measures that required anti-competitive practices among competing suppliers.⁵⁶

These findings were primarily based on the structure of the ILD Rules, which by law required the parties to engage in anti-competitive practices that were deemed equivalent to price-fixing and market sharing practices.⁵⁷ In its decision, the Panel recommended that the Dispute Settlement Body request Mexico to bring its measures into conformity with its obligations under the GATS.⁵⁸

Mexico did not appeal the decision but expressed some reservations about the Panel's findings and recommendations. The Panel Report was

⁵⁴ See Panel Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004) [hereinafter Mexico Panel Report].

⁵⁵ See Bjorn Wellenius et al., *Telecommunications and the WTO: The Case of Mexico* (World Bank Policy Research, Working Paper No. 3759, 2005) (detailed discussion of the implications of the WTO panel for international trade in services in general, and trade in services in the telecommunications sector).

⁵⁶ Mexico Panel Report, *supra* note 54, at 199.

⁵⁷ The "uniform settlement rate" and the "proportionate return" system.

⁵⁸ Mexico Panel Report, *supra* note 54, at 224.

finally adopted by the Dispute Settlement Body on June 2004.⁵⁹ Thereafter, Mexico and the United States agreed on certain actions to be taken in order to comply with and implement the Panel's recommendations.

Among other actions, Mexico agreed to remove certain legal provisions (namely the ILD Rules) relating to the proportional return system, the uniform tariff system, and the requirement that the carrier with the greatest proportion of outgoing traffic to a country (Telmex) negotiate the settlement rate on behalf of all Mexican carriers for that country, all of which were deemed to be anti-competitive provisions. As a result, on August 11, 2004, COFETEL published the new International Telecommunications Rules which replaced the ILD Rules.⁶⁰

The elimination of the anti-competitive provisions contained in the ILD Rules and the new legal framework provided by the International Telecommunications Rules are perceived as a positive step towards mitigating some of the market failures in this case and allowing competitive commercial negotiations of international settlement rates. However, it is unfortunate that an international ruling was necessary in order for Mexico to make some of the necessary regulatory reforms to address this behavior.

For the most part, the rest of the enforcement actions taken by the CFC and COFETEL to address market structure problems that facilitate anti-competitive and discriminatory behavior by Telmex have been largely unsuccessful. As long as the procedures in the administrative and judicial spheres continue to be blocked and challenged, it is uncertain when or how the structural problem will be resolved.

IV. CONCLUSIONS

The competition authority in Mexico has faced serious challenges in the application of the LFCE. Some of the difficulties derive from loopholes in the laws, changes in the scope of the LFCE due to judicial interpretations, lack of sectoral cooperation, insufficient powers of the CFC and the sectoral regulators, and the regulatory arbitrage by market participants, including the abuse of the *amparo* process and the inability to impose sanctions effectively. All of these difficulties have limited the effectiveness with which the competition law is applied by the CFC and the sectoral regulators. Some of these difficulties are clearly illustrated by the case of the telecommunications sector in Mexico.

Despite the progress achieved over the past decade, much remains to be done to increase the effectiveness of competition policy in Mexico. One

⁵⁹ *Reparte OMC culpas entre Mexico y EU*, REFORMA (Apr. 3, 2004) (note the cited comments made by Ricardo Ramirez, Deputy Director General, Ministry of Economy).

⁶⁰ *Reglas de Telecomunicaciones Internacionales (RTI)*, issued in June 2004, which replaced the previous *Reglas de Larga Distancia Internacional (RLDI)*, as amended *Diario Oficial de la Federación*, 11 de Diciembre de 1996.

of the main policy recommendations that can be derived from this diagnostic is the need to strengthen both the CFC and the sectoral regulators and increase the cooperation among them. The main way to strengthen them would be by granting them greater independence from the ministries they currently depend on, and granting them more powers to sanction anticompetitive behaviors.

Of course, these recommendations would likely prove ineffective if they are not accompanied by a parallel reform to the judicial system, which would limit the use of the *amparo* process. One of the proposals that has been advanced is the creation of specialized competition courts that could speedily dismiss frivolous requests for *amparos*. Evidently, this suggestion does not preclude any other innovative solutions which could expedite the judicial decision making process. Some of these suggestions have already been incorporated in the reforms to the LFCE being discussed by the Congress. Those that are not included in the reform will eventually need to be considered, since there is an urgent need to revamp the implementation of competition policy in Mexico.

