Competition Law and Policy in Mexico: Successes and Challenges

Umut Aydin
Instituto de Ciencia Política,
Pontificia Universidad Católica de Chile
uaydin@uc.cl
and
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George C. Lamb Jr. Visiting Fellow in Regulatory Governance,
Kenan Institute for Ethics, Duke University

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Introduction

Mexico adopted its first competition law in 1992, in preparation for the signing of the North American Free Trade Agreement, which required the three signatory states to have national competition laws. Despite having provisions against monopolies in its constitution of 1857 and 1917, a comprehensive legislation on competition including regulations against cartels, abuses of dominance, merger review, and an agency to implement these laws was a new phenomenon for Mexico. As is frequently the case with legal transplants, at the time few domestic actors knew what competition law meant and what impact, if any, it would have on them. Even for the Federal Commission of Economic Competition (CFC) the early years was a period of trial and error, and the experience proved taxing. Actors within the government and the private sector criticized the Commission for being weak (OECD 2004), court proceedings triggered by companies’ complaints slowed down investigations, and a number of the CFC’s decisions were reversed by the district courts on procedural grounds.

Fast forward to 2015, and the competition policy scene has changed dramatically in Mexico. The CFC, reconstituted after constitutional amendments in 2013, and with investigative powers significantly increased with reforms in 2006, 2011 and 2014, has become a well-respected enforcement agency ranking above some Western European competition agencies with longer histories and much greater resources in Global Competition Review's annual rankings (Global Competition Review 2014). It participates actively in international fora such as the International Competition Network (ICN) and the Competition Commission of the Organization for Economic Cooperation and Development (OECD), and is held up in the Latin American and Caribbean region as a model.

This paper explores the factors that have contributed to the transformation of the Mexican competition regime from a relatively ineffective regime in a highly concentrated economy to a (relative) success story. Surely, as an agency relatively well-endowed with financial and human resources in an upper middle-income country, the CFC has had some advantages compared to agencies in poorer countries. As the variation in the effectiveness of the Mexican competition regime over time demonstrates, however, national income or agency resources do not tell the whole story. An agency with sufficient resources could still be ineffective. This paper investigates the sources of the success of Mexico’s competition regime with a perspective that goes beyond a
focus on resources, and emphasizes instead the politics, both domestic and international, of agency effectiveness.

In particular, I focus on domestic political factors and support from international organizations as crucial factors contributing to the effectiveness of the Mexican competition regime. Domestically, I argue that a constituency in favor of better competition policy enforcement—composed of consumers, firms traditionally excluded from markets, as well as foreign firms—gradually emerged and gained voice in Mexico. The increasing voice of this constituency by itself might not have been sufficient to bring about significant improvement in Mexican competition policy, however. I argue that the domestic conditions were reinforced by international organizations, in particular the expert support of the OECD Competition Commission, as well as the World Bank (WB), the International Monetary Fund (IMF) and the ICN. These organizations provided information, expert evaluations and political support for the CFC in its negotiations with domestic political actors, and therefore, combined with domestic factors enabled significant improvements in the Mexican competition regime.

In the next section, I provide a brief overview of the Mexican economy and the process that led to the adoption of the first competition law in Mexico in 1992, the Federal Law of Economic Competition. Section 2 reviews the provisions of the law, and organizational make-up of the enforcement agency, the Federal Competition Commission. Section 3 discusses the obstacles that the Federal Competition Commission faced in its early years in implementing the competition law. Section 4 provides an overview of the 2006, 2011, 2013 and 2014 reforms, while section 5 discusses the factors that made these reforms possible. Section 6 concludes.

1. Mexico’s Rocky Road to the Federal Law on Economic Competition in 1992

After nearly 50 years of developmental policies aimed at protecting and fostering its domestic market, in the 1980s Mexico embarked on a route towards free trade and domestic liberalization. Since the discovery of oil resources in the 1970s, Mexico had gradually turned towards the international market, as it became a major exporter of oil and gas. But the catalyst for real change from Import Substitution Industrialization (ISI) towards economic liberalization in the 1980s was two-fold, namely, the debt crisis of 1982 and the accumulated strains on the economy following years of ISI. The result of these was high inflation and a sharp fall in real wages (over 7 percent, on average, annually in the 1983-1988 period) (Lustig 1995, 46). To remedy these trends, in the mid-1980s the Mexican government under Miguel de la Madrid (1982-1988), helped by the
International Monetary Fund, embarked on an ambitious program of deregulation, privatization of state-owned enterprises and trade liberalization. The reforms continued to deepen under the presidency of Carlos Salinas (1988-1994).

Mexico’s adoption of liberalizing reforms in the aftermath of the debt crisis was the outcome of an interaction between domestic and international factors. The international impetus for Mexican reforms emanated from Mexico’s need for funds in the midst of the debt crisis. The IMF and the US Treasury were willing to help, but they imposed strict conditions of austerity and liberalizing reforms in exchange for loans. Conditionality of loans was a direct pressure on the Mexican state for reform, but it is important to emphasize that this pressure was effective because it found sympathetic reception from a group of US-trained technocrats that had risen to the upper echelons of the Mexican administration in the early 1980s (Babb 2001, Centeno 1996, Heredia 1994). Presidents Miguel de la Madrid and Carlos Salinas, both with graduate degrees from Harvard, were prime examples of such technocrats, but others also thrived at the Finance Ministry and the Central Bank. The domestic impetus for reforms came from them rather than societal interests (Babb 2001, 175). Moreover, the US-trained Mexican technocrats were not only firm believers of the virtue of market reforms, but also had close ties, both personal and professional, with the heads of the international financial institutions such as the International Monetary Fund and the World Bank, as well as the US Treasury and the Federal Reserve, which intermediated between Mexico and private banks (Babb 2001, 178). It was the influence of such technocrats, together with the conditionality of loans from the IMF that led to a set of economic reforms that significantly liberalized the Mexican economy.

The first phase of Mexican reforms focused mostly on structural adjustment. The administration slashed the government budget, radically devalued the peso, eliminated subsidies, and reduced government employees’ wages (Babb 2001, 179). By the mid-1980s, it launched deeper institutional reforms such as privatization, deregulation and regulatory reform, and trade liberalization. As with earlier reforms, a coalition of technocrats within the Finance Ministry and the Central Bank pushed for trade liberalization, and with the support of the IMF and the World Bank, embarked on reforms that resulted in Mexico’s entry into the General Agreement on Tariffs and Trade in 1986 (Babb 2001, 181). Through further reforms in 1987, Mexico went even beyond GATT requirements, and in 1991 the Mexican administration announced that it would start negotiations with the US and Canada for a North American Free Trade Agreement. The negotiations started in 1991 and the agreement was signed in 1993.
This is the context in which the first modern Mexican competition law, the Federal Law on Economic Competition was adopted in the Mexican Congress. The adoption of the law in December 1992 was the outcome of the interplay of domestic and international factors. In the domestic context, it is important to remember that while the proposal for a competition law surfaced in the context of regulatory reforms of the late 1980s, the history of competition law goes back to the Mexican constitution of 1857, which prohibited monopolies (Avalos 2006, 10; Castañeda 1998). The Mexican Constitution of 1917 likewise included a ban on monopolies, in addition to regulations against cartels and abuses of dominance, but these provisions were not enforced in practice due to the absence of an implementing regulation (del Villar and Soto Álvarez 2005, 108). The 1934 Organic Law of Monopolies was likewise ineffective (Newberg 1993, 587). In practice, until the end of the 1980s, many businesses were shielded from external competition through the chambers of commerce, industry or by some level of government (Avalos, 2006: 10). The degree of economic concentration in the economy was high. In 1992, twenty-five companies accounted for 47.1% of Mexican GDP (Newberg, 1993: 603).

In the context of the broad institutional reform agenda of the 1980s, a number of officials from the Economic Deregulation Unit at the Secretary of Commerce and Industrial Development (SECOFI) became convinced of the necessity to adopt a competition law (Avalos, 2006: 10). These officials perceived competition law as an antidote to collusion among large firms to raise prices, as a counterweight to state owned monopolies, and as a defense of consumers and firms in the regulated sectors of the economy in which the regulators have gotten too close to the sectoral interests. The expectation was that the law would not only promote competition in the market place, but could also reduce state intervention in the economy (Avalos, 2006: 10). The officials in the Unit thus begun to explore the competition laws of foreign countries, particularly of the US, Canada, Spain, Germany and the European Union, had meetings with officials from these countries and the OECD, and reviewed the academic literature (Avalos, 2006: 11).

In the meantime, progress in the negotiations with the US and Canada on the North American Free Trade Agreement gave an additional impetus for the adoption of a competition law, as NAFTA committed the signing parties to the adoption of measures proscribing anti-competitive business conduct (OECD, 2004; Castañeda Gallardo, 1996: 21). According to Avalos (2006: 10), the biggest objections to the law came from different parts of the government, but the level of support from the public and the business community was also low (OECD, 1998). In a sense, signing NAFTA was a
way for the administration to lock-in its reform agenda, including the adoption of the competition law, against its opponents.

The process resulted in the adoption of the Federal Law on Economic Competition (Ley Federal de Competencia Económica, hereafter LFCE) in December 1992, and the establishment of the Federal Competition Commission (Comisión Federal de Competencia, hereafter CFC) in June 1993. The law and the design of the Federal Competition Commission incorporate elements of both US antitrust and the EU model. The text of the FLEC reflects the US antitrust case law and economic thinking at the time of its adoption, instead of copying the wording of the US Sherman Act, or of the competition provisions of the Treaty on the European Union (ten Kate and Niels, 2006: 718). Enforcement takes an EU-style administrative model. The primary concern of the Mexican competition law is economic efficiency, with the idea that other goals such as development will follow from ensuring economic efficiency (van Fleet 1995).

2. The Federal Law on Economic Competition (1992)\(^1\)

The LFEC includes provisions against cartels, abuses of dominant positions, as well as merger review, and allows for competition advocacy. The LFEC classifies potentially anticompetitive practices as either absolute or relative. Absolute monopolistic practices include hard core cartels between competitors on price, output, market division and bid rigging, and are prohibited per se (OECD 1998, 10, 11). Relative practices, which include various forms of vertical restraints, and unilateral conduct such as exclusive dealing, resale price maintenance, tying and refusals to deal may be found illegal only if the agents have substantial power in a defined relevant market (OECD 1998, ten Kate and Niels 2006, 719). Parties may offer efficiency defenses in cases involving relative practices. The OECD (1998, 11) argues that presuming efficiency and requiring market power to be shown before finding a violation decreases the regulatory burden both on the CFC and the firms.

The per se prohibition of horizontal price-fixing agreements was important in reinforcing other reforms that Mexico was undertaking at the same time, such as the elimination of publicly sanctioned but privately arranged price controls in various sectors, and thus in changing old habits of both private and state actors (OECD 1998, 10). Prior to the mid-1980s, “prices for most goods and services were fixed by law, and the ostensibly regulated price level was often the result of an agreement among the members of the industry,” typically organized into business chambers and

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\(^1\) The LFEC was replaced by a new law with the same title in 2014. In this section, I use “1992 LFEC” to refer to the old law in cases where the new LFEC differs from the old one.
supervised by the SECOFI (OECD 1998, 10). In its early years the CFC devoted significant effort into eliminating such collusion on prices in sectors such as transport, where business associations previously set minimum prices. Likewise, the CFC penalized local producers of tortillas, which engaged in a market-sharing agreement that was sanctioned by the local government, and recommended the local governments to refrain from supporting such actions in the future (OECD 1998, 11).

Monopoly is prohibited by the LFEC (as well as the 1917 Constitution which is still in force) but there is no specific section of the FLEC that deals with monopolies (OECD 1998, 12). Instead, what in other countries would be treated under monopoly or abuse of dominance provisions are treated as relative monopolistic practices. Some of these practices were specified in the law, such as resale price maintenance, tied sales, exclusive dealing and refusals to deal, while others could be reached by the catch-all provision (Article 10 paragraph 7) that defined "any conduct that unduly damages, or impairs the competitive process and free access to production, processing and distribution and marketing of goods and services" as anticompetitive (OECD 1998, 12, Pérez Motta and Sada Correa 2013, 11).2 The LFEC defined relative monopolistic practices as unlawful if they had the intent or effect of excluding competitors from the market, and not in terms of its harm to consumers.

Under the 1992 LFEC, the CFC did not have the power to restructure a monopolized industry. Sector-specific regulations and privatization programs could address this issue, though not always with success, the notable example being the telecoms giant Teléfonos de México (TELMEX), created at the hands of the state during the privatization process.3 Similarly, monopolistic pricing was not something that the FLEC addressed (OECD 1998, 12). Sectoral regulators could have used sector-specific regulations to control abusive pricing practices by dominant firms, but the CFC first had to identify the firm as having market power in a sector before the regulator could step in to regulate the conduct in question.

The LFCE prohibits mergers whose objective or effect is to reduce, distort or hinder competition (OECD 2004, 25). All mergers that go beyond a certain threshold in terms of sales or assets have to

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2 The explicit list of relative monopolistic practices has been extended in subsequent reforms of the LFEC. This was partly a reaction to a Supreme Court decision taken in 2006 that found the catch-all provision too vague to be a basis for a CFC decision.

3 Some of the early privatizations in Mexico’s reform program resulted in the creation of private firms with significant market power such as TELMEX, because the public monopoly was sold as a package of companies to a single investor in order to maximize revenues rather than being broken up (del Villar 2009). Furthermore the government offered significant reductions in taxes, and an effective monopoly for five years after the privatization in order to sweeten the deal. There was no regulatory framework in telecommunications or a competition law in place when privatizations occurred.
be notified to the CFC (OECD 2004, 26). In assessing mergers, the LFCE requires the CFC to consider whether the merging parties would be able to fix prices unilaterally, substantially restrict competitors’ access to the market, or engage in unlawful monopolistic conduct in assessing mergers. The CFC has to identify the relevant market and determine market power in its analysis of mergers.

The LFEC recognizes the possibility that the state itself or state owned enterprises could commit anticompetitive actions. State-owned enterprises are subject to LFEC’s provisions on relative and absolute monopolistic practices, except in areas of “strategic concern,” which Article 28 of the Mexican constitution lists. Other than the exceptions of these strategic sectors, the FLEC applies to all economic actors, public or private. The CFC can give its opinions if another organ of the state acts in a way to restrict competition (OECD 2004, 15), but the opinion has no binding effect. The LFEC empowers the CFC to give its opinion on the effects that existing legislation, regulations, and administrative acts may have on competition, and upon request by the Federal Executive, on the effects of competition on new laws and regulations proposed to the Congress (OECD 1998, 25). The CFC participates in inter-ministerial committees in order to inject competition policy principles into regulatory decisions, and therefore has been involved in policy-making about privatization, licensing, standards, sectoral regulation and foreign trade (OECD 1998, 25).

The law empowers the Comisión Federal de Competencia to enforce these provisions. The CFC, which became operational in 1993, was designed as an independent agency attached to the SECOFI. The decision-making body in the CFC was a plenum of five commissioners, appointed by the President for staggered ten-year terms, which took decisions by a majority vote (OECD 1998, 17). The general impression of observers such as the OECD (1998, 18; 2004) is that the CFC was for the most part able to protect its independence from the Executive and other state agencies even before the 2013 reforms. According to Guerrero, López-Calva and Walton (2009) the CFC has also been able to remain relatively free of influence of big business compared to sectoral regulators such as the Federal Commission for Telecommunications (COFETEL), which has close ties to the Ministry of Telecommunications and Transport (SCT).

3. The First Decade of the LFEC: Limitations and Challenges in Implementation

The framing paper to this symposium describes how various conditions in developing country contexts prevent competition agencies from effectively implementing competition laws and engaging in competition advocacy. Some of those conditions have been less of an issue in Mexico
than in poorer countries. For instance, recruiting staff with technical expertise has not been a significant obstacle in the way of the development of Mexican competition regime. An OECD report published in 1998 (OECD 1998, 21) notes budgetary resource issues to be a concern, especially after the tightening of the government budget after the 1994 crisis (the agency budget fell about 30% in real terms between 1994 to 1997). The 2004 OECD Peer Review of Mexican competition policy likewise draws attention to the problem, and calls for an increase in CFC’s budget among its recommendations (OECD 2004, 64-65).

Budgetary resources certainly are an important obstacle to the effectiveness to any agency, but a generous budget allocation is not a sufficient condition for agency success. In fact, Dalkir (2009) finds that the CFC punches below its weight in terms of efficiency given its budgetary resources. In other words, the CFC underperforms in effectiveness given the level of its budget, and therefore merely increasing its budget would not make the CFC a more effective agency in regulating competition in the Mexican economy. What other factors have impeded the Mexican competition regime’s effectiveness?

Some obstacles to the effectiveness of competition policy in the early years emanated from the provisions of the LFEC itself and the powers granted to the LFEC under the law. The LFEC did not allow the CFC to restructure monopolies, which OECD (1998) argues was reasonable, given the lessons drawn from the experience of other countries about the difficulty and costs of breaking up monopolies (OECD 1998, 13). It quickly became clear, however, that a lack of power to address structural monopolies could be problematic in a country like Mexico with a highly concentrated economic structure.

Moreover, the division of responsibilities between sectoral regulators and the CFC in terms of dealing with relative monopolistic practices in regulated sectors proved somewhat problematic. As described above, the CFC was responsible in identifying whether a firm has market power in a sector, but it was up to the sectoral regulator to address this behavior after the decision of the CFC, with the CFC not being party to the negotiations or the preparation of regulation to deal with the anticompetitive conduct. This division of responsibilities became problematic if the CFC did indeed find the firm to have significant market power, but the sectoral regulator was too weak, or “captured” by the actors whose behavior it was supposed to regulate (OECD 1998, 32).

The investigative powers granted to the CFC were also widely perceived to be inadequate (OECD 2004, 65). The CFC did not have powers to conduct dawn raids—unannounced searches in
company headquarters—which would have improved its chances of collecting meaningful evidence in cartel cases. Neither did the CFC initially count on a leniency program that could help in its efforts to attack cartels. Moreover, the fines it could impose (and effectively collect) were not deemed adequate to deter firms from engaging in anticompetitive conduct. Prior to the 2011 reforms, The Economist (2010) comments that it was profitable to cheat even if caught.

In addition to legislative loopholes, a significant obstacle to the effective implementation of the competition law arose from various aspects of the judicial system in Mexico. Under the LFEC, the parties to a competition case had ample opportunities for judicial review if they were dissatisfied with the CFC's decisions (OECD 2004, 44). The first of these is the “amparo” (injunction) action, established in Articles 103 to 107 of the Mexican constitution. An amparo can be claimed by anyone in the federal district courts, who can “raise a claim that he is being subjected to an unconstitutional statute or that his due process rights are being infringed” (OECD 2004, 44). CFC investigations and decisions have been a target of amparo claims, because (OECD 2004, 44):

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\text{the due process clause in Article 16 of the Mexican Constitution requires that agency orders articulate the “legal basis and justification for the action taken.” This language has been construed by the Supreme Court to permit judicial abrogation of agency action that is arbitrary or capricious, unsupported by substantial evidence, or founded on reasoning that is illogical or contrary to general principles of law.}
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If the courts decided an interlocutory procedural amparo in favor of a firm, the CFC typically commenced a new proceeding, against which the firm could file a new amparo (OECD 2004, 44). If a final CFC decision was at issue, parties could request, and frequently obtained, a motion to stay until the amparo review was complete. Amparo decisions could be appealed in higher courts, and if the amparo request was addressed at the constitutionality of the LFEC, then the appeal went straight to the Supreme Court. While the CFC generally won in the Supreme Court with respect to the constitutionality of its actions and of the law itself, (with a few significant exceptions), the district courts have been liberal in granting amparos.

Designed to protect individuals’ due process rights, amparo claims came to be used aggressively and in increasing numbers by private actors against the CFC, and complicated competition law enforcement in various ways. They delayed the CFC’s proceedings, as firms frequently filed multiple claims in different districts or filed subsequent amparos throughout the proceedings to delay a CFC decision. For instance, after CFC declared TELMEX to be a dominant carrier in 1998—a necessary
step for the sectoral regulator COFETEL to step in and regulate competition in the sector—its
decision was stayed by a series of amparos, changes to its declaration, and further amparos, until
finally a court annulled the CFC’s decision in 2006 because the evidentiary basis for it was outdated
(Noll 2009, 382). Amparos may also delay the collection of fines when the CFC takes a decision to
fine a company. Dealing with the amparos filed against it imposes a significant strain on the
agency’s resources. The OECD (2004, 54) notes that the lawyers in the Legal Affairs Directorate of
the CFC devote 40% of their time to dealing with the amparo cases.

A second way in which the parties to a CFC case could seek judicial relief was through an appeal to
the Federal Court of Fiscal and Administrative Justice (Tribunal Federal de Justicia Fiscal y
Administrativa). This court normally reviews tax cases, but it asserts jurisdiction to review any
agency action that involves the imposition of a monetary payment obligation on a private party, and
thus reviewed a growing number of cases in which the CFC imposed fines (OECD 2004, 46). The
CFC lost a number of cases under this court on the grounds that its orders imposing fines were not
adequately justified. OECD (2004, 47) reports that due to judicial and procedural intricacies of the
system, the CFC was able to collect only 9.5% of all the fines it imposed between 1997-2002, with
18.5% revoked or lost on judicial review, and 72% remaining uncollected.

In addition to the judicial review procedures such as amparo and the use of tax courts to challenge
decisions on fines, which had become powerful tools in the hands of companies to prevent or delay
enforcement, some broader concerns about the functioning of the Mexican judicial system impeded
successful competition law enforcement in its first decade. The unfamiliarity of the district courts
with substantive antitrust issues was one of them. In its early years, the CFC saw many of its
decisions reversed at the district courts, mostly on procedural grounds (OECD 2004, 45). In
addition to the judges’ unfamiliarity with competition policy issues, the civil law model in Mexico
“has traditionally involved detailed legislative enactments, and courts are unused to dealing with a
statute as short and non-specific as the LFCE. By ruling adversely on a procedural point, the court
can send the case back to the CFC and avoids resolving the antitrust question” (OECD 2004, 45).
Judges’ lack of experience with antitrust has been a problem in many developing countries with
young competition regimes (International Competition Network 2007), and some have
responded—as Mexico did with its reforms in 2013—by establishing specialized courts (Ginsburgh
and Wright 2013).
Guerrero, López-Calva and Walton (2009, 126-7) also raise questions about the weakness of the judicial system in Mexico in resisting outside pressures, such as those coming from big business. In their empirical analysis of amparos requested in competition cases, they find that companies directly or indirectly controlled by billionaires (as listed by Forbes) were more likely to secure an amparo from the courts compared to other firms (Guerrero, López-Calva and Walton 2009, 129). They cautiously interpret these results as supportive of their claim that concentrated business interests have undue influence in the Mexican judicial system. This does not necessarily mean that the judicial system is corrupt—though it may be, and the public's skepticism about the judiciary seems to suggest that the public perceives it to be that way as big business also commands significant resources to hire the best law firms to defend itself. Del Villar (2009, 334) notes that the CFC’s annual budget is equal to two days worth of profits by TELMEX and RadioMóvil Dipsa (TELCEL), the two big companies that dominate the landline and cellular phone markets in Mexico, both controlled by Carlos Slim. The OECD notes that “there is some belief in the private sector that the Commission is simply outgunned in amparo cases and cannot match the legal resources arrayed against it” (OECD 2004, 54). If there is indeed a big business bias in the judiciary, this would significantly undermine competition law enforcement, particularly against dominant business interests.

Proceedings delayed by series of amparos, decisions frequently overturned by district courts, failure to impose or collect fines not only dilute the impact of the CFC’s enforcement efforts, but they may have also weakened the image of the CFC in the eyes of the Mexican public, which could otherwise have become an important constituency for the effective implementation of competition policy. The OECD report in 1998 mentioned that the CFC had started acting cautiously as a reaction to the aggressive court cases that private actors were bringing against it, and that this has led to a perception on the part of the public, and some companies and state actors that the CFC was weak (OECD 1998, 31). While by the time of OECD’s peer review in 2004 this perception was mostly dissipated, it certainly may have been a factor explaining the relative ineffectiveness of the CFC in its early years.

Another factor that is frequently raised as one of the key impediments to the effectiveness of competition policy in Mexico—and more broadly in developing countries—is the lack of genuine

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4 According to Latinóbarometro (2015) surveys, in 1995 32% of respondents said they had a lot or some confidence in the judiciary, while 64% had very little of no confidence. In 2013, 28% expressed a lot or some degree of confidence, while 68% had very little or no confidence in the judiciary.
support for competition policy among the companies, state actors and the public. Lack of awareness of and support for the competitive process and the competition law detract from efforts to establish an effective competition policy, because first of all, they influence the degree of compliance by economic actors. It is more costly to elicit compliance with a law for which acceptance is low. Better awareness of the law and support for it could trigger more (and better quality) complaints about anticompetitive conduct, less tolerance for the abuses of the law, and overall greater political support or pressure for its enforcement.

In Mexico, in the initial years after the adoption of the competition law (and various parallel reforms), many private and state actors continued to operate according to the pre-reform formal/informal rules of the game. They may have done so not only because they benefited from the existing system, but perhaps also because they did not know enough about it, or did not internalize it. Similarly, the public more broadly was unaware of the law and its potential benefits, and was not generally supportive of the idea of competition as an organizing principle of the economy in the early years of the competition regime (OECD 1998). The problem persisted to some degree even after ten years of enforcement of the law (OECD 2004). Moreover, the OECD (2004, 12) observes that in the Mexican context, being perceived as a product of the Salinas era, or a requirement imposed on Mexico by NAFTA reduced the support for the competition law and the CFC in the early years.

4. Reforms to the Mexican Competition Regime

Reforms to the competition law in 2006, 2011, 2013 and 2014 were intended to address some of the problems that impeded the effectiveness of Mexican competition regime, and significantly improved the functioning of the CFC. The 2006 reform introduced a leniency program, which reduces penalties for firms that provide evidence in cartel cases, and thus increasing the likelihood that cartel members will cooperate with the authorities and help successfully prosecute cartels. The law also allowed the CFC to impose structural remedies such as divestitures in monopoly cases, and expanded the list of relative monopolistic conditions listed in the Article 10 of the 1992 LFEC (OECD 2011a, 128).

While the 2006 reforms strengthened the CFC’s enforcement efforts, there were significant gaps remaining in the CFC’s powers of investigation. These were addressed with further reforms in 2011 (OECD 2012, 3). With the 2011 reforms, the CFC acquired powers to conduct dawn raids, which are unannounced visits to companies under investigation to gather information and
evidence. Dawn raids are particularly useful tools for collecting evidence in cartel cases. The CFC’s fight against cartels was reinforced additionally by expanding the scope for criminal prosecution against individuals in cartel cases. The reforms also strengthened the CFC’s deterrent power by increasing maximum fines from $7 million to 10% of the firm’s annual revenues in Mexico. The reform granted the CFC with more flexibility in reaching settlements with parties while the investigation is ongoing, as opposed to the earlier regime in which the CFC could only come to a settlement after it concluded its investigation (OECD 2011b, 4). The CFC also was granted with the power to issue interim measures, by which it can oblige firms to cease alleged anticompetitive conduct while an investigation is executed. Finally, class actions for damages in competition law cases were allowed (OECD 2012, 4).

The competition regime in Mexico saw its most fundamental reforms in 2013 and 2014. After being elected to office in 2012, Enrique Peña Nieto announced the Pact for Mexico (Pacto por México), an agreement between the three main parties of Mexico on a broad package of reforms including in education, competition policy, taxes and the legal system (The Economist 2013). The competition policy reform started in 2013 with constitutional amendments that changed the legal status of the CFC, basically reconstituting it as a legally independent entity under the Mexican constitution (OECD 2013a, 4). The reform increased the number of commissioners in the plenum from five to seven, and made their selection process more transparent by making an evaluation committee responsible for presenting the candidates, which will then need to be approved by the Senate. The 2013 reforms also created the Federal Institute of Telecommunications (IFETEL), another independent legal entity, and made this agency responsible for competition matters in telecommunications and broadcasting. The commissioners of the IFETEL are selected with the same method as the CFC commissioners. The reform established specialized courts to oversee appeals to competition law and telecommunications cases. The amparo requests in these areas will also be resolved by these specialized courts.

In 2014, the Mexican congress adopted a new competition law, as implementing regulation to the 2013 constitutional amendments, which repealed the 1992 law. The new LFEC (title unchanged) creates an investigation unit within the CFC in order to separate investigative authority from decision-making authority. The law further strengthens the CFC’s powers by expanding the scope of evidence that it can collect through dawn raids, and increasing the fines it can impose. The new law expands the list of relative monopolistic practices. Finally, an important change is that CFC resolutions are not subject to a judicial stay pending the outcome of litigation.
These series of changes have significantly reinforced the investigative and sanctioning powers of the CFC, reduced its regulatory burden, and addressed most issues emanating from amparos and delayed legal proceedings.\(^5\) They have also hopefully made the CFC more transparent, and reduced the uncertainties and inconsistencies in its actions and decisions, to address the criticisms that have been raised against it before (OECD 2004). The reforms have surely helped raised the domestic and international profile of the Mexican competition regime. After the 2013 reforms, the Global Competition Review increased Mexico's ranking from two-and-a-half stars to three stars, placing it above some of the Western European competition agencies. It is perhaps too early to tell how the reconstituted CFC will perform, but there are many encouraging signs.

5. Explaining the (Relative) Success of the Mexican Competition Regime

Given the impediments to the effective implementation of the Mexican competition regime, such as legislative loopholes, the problems with the judiciary, and the lack of support from the public, how did the Mexican competition policy improve over time, and the CFC become an actor well respected both domestically and internationally? What explains the gradual strengthening of the Mexican competition law through legislative and constitutional reforms?

My argument is that the interplay of domestic and international factors has enabled the adoption of the series of reforms starting in 2006. Domestically, the pressure for better competition law and enforcement came from the diffuse interests of consumers, firms that have been excluded from traditionally concentrated markets and foreign firms seeking access to the Mexican market. Consumers’ interest in more effective competition policy arises from the potential benefits competition policy may bring to them in the form of lower prices. The high costs of services provided by dominant firms operating in network industries (such as telecoms and broadcasting) were one of the most visible signs of the concentrated economic structure of Mexico, and hurt consumer interests significantly for a long time. Mexican consumers pay more for telephone and broadband internet services than consumers in other Latin American countries, and the services they receive are of lower quality (The Economist 2014). While lack of competition and its consequences for consumers in telecoms is highly publicized, in reality many more sectors suffer from low levels of competition, generating large costs for consumers. For instance, in 2010 the CFC

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\(^5\) But see concerns raised about the 2014 changes to the competition law, and especially its definition of practices erecting “barriers to competition” as violations of the competition law (Perrot and Komninos 2014). This provision has been criticized for being vague, creating a norm outside of international standards and for these reasons, generating uncertainty.
busted a bid-rigging agreement between firms providing insulin and other supplies to the healthcare system, which, according to some calculations cost 43$ to consumers between 2003 and 2006 (The Economist 2010). According to Urzua (2013), the poorest Mexican citizens devote 7% of their spending to overcharging by firms with market power.

Former Chairman of the CFC Eduardo Perez Motta (2004-2013), speaking of the recent reforms in telecoms, says that the reforms were possible because “the people had become fed up with paying so much in phone charges” (cited by Fox 2015). Such intense interests, however, do not necessarily result in collective action that can push for changes. Consumer interests are diffuse and hard to mobilize. Historically very few consumer organizations existed in Mexico (OECD 2004). That might be changing recently with the emergence of non-governmental organizations such as the Observatel, a watchdog of reforms in the telecoms sector (Malikn 2014). To make up for the weakness of consumer organizations, in 2005 the CFC entered into an agreement with the Office of the Federal Prosecutor for the Consumer (PROFECO), providing for more communication and coordination between the agencies and therefore having more direct means to hear about consumer concerns (OECD 2008, 34). What could also be changing gradually is the way that the public debate about competition and competitiveness has recently been framed in Mexico. Increasingly, the costs that dominant firms impose on consumers, on innovation, and productivity in Mexico has been emphasized in public debates (thanks partly to the efforts of the CFC). As a result, dissatisfaction with the consequences of economic concentration may have played a role in the 2012 elections that brought Peña Nieto to power with a sweeping reform agenda.

Firms that have difficulty entering markets dominated by large players are another source of support for the CFC. Such firms typically bring complaints to the agency and challenge dominant firms’ anticompetitive conduct in the courts. For instance, Avantel, a Mexican cellular provider established in 2001, for instance, has sued TELMEX nine times for abuses of dominance (Guerrero, López-Calva and Walton 2009, 129). The same company used the Freedom of Information Act to force the COFETEL to provide Avantel with a copy of the concession title granted to TELMEX by the government in 2007 (El Universal 2007). Such companies trying to break into markets serve as sources of information and support for the CFC. Additionally, foreign firms could be sources of this kind of pressure. For instance, in 2000, the US government brought a dispute against Mexico in the World Trade Organization (principally on behalf of AT&T and MCI), claiming that its telecoms regulations breached its obligations under the General Agreement on Trade in Services obligations. The COFECE had granted TELMEX, as the firm with the largest share of the outgoing calls, the
power to fix the “termination rate” to be paid by all foreign carriers (e.g. AT&T and MCI) for calls terminating in Mexico (Fox 2006, 276). The GATS ruled against Mexico in 2004, forcing COFECE to change the regulations.\(^6\)

These domestic demands for stronger competition law and better enforcement may not have been sufficient without the simultaneous pressures from international organizations for reform. The most direct external influence on the Mexican competition law and policy came from the OECD. The OECD report on Mexican competition policy (1998) and the Peer Review of Mexican competition law and policy (2004) were crucially important in the CFC’s efforts to convince the legislators of the need for reform in competition law in 2006. In the words of the CFC (cited in OECD 2008, 34)

> The OECD's peer review provided a neutral voice to the discussion by presenting a non-partisan analysis of the state of competition policy in Mexico and simply outlining best practices based on its experience in the area with OECD member countries. The Report was used and cited in communications with the legislature and federal public administration.

The OECD also provided lengthy comments on the draft of the reforms, and a letter summarizing OECD’s opinion on the reforms written by the head of the OECD Competition Commission was shared with the Mexican legislators in the process leading up to the adoption of the reforms (OECD 2008, 34). The 2011 reform likewise drew significantly on OECD peer reviews and follow-ups (OECD 2013b).

In addition to the OECD, organizations such as the International Monetary Fund (2006, 17), the World Bank (2007) and the World Economic Forum repeatedly emphasized in their reports that lack of competition has been an important impediment to growth in Mexico (Guerrero Rodriguez and Ramírez 2013, 396). The results of these reports are frequently reported on in the Mexican media, and contributed to the public debate on the costs of non-competition on the Mexican economy and democracy.

Finally, the International Competition Network (ICN), which is a virtual network of competition agencies established in 2001, has been an important source of influence on national competition regimes (Coppola 2011, Fox 2009). The ICN was launched with the aim of contributing to cooperation and convergence among national competition regimes. Among its successes, the

\(^6\) According to del Villar, the impact of this regulatory change on prices has been huge (del Villar 2009, 340). International settlement rates have fallen from approximately $0.40 per minute in 1997 to approximately $0.02 in 2007 in areas open to long distance competition.
Guiding Principles and Recommended Practices for Merger Notification and Review Procedures stand out. Active promotion of the Recommended Practices by the ICN has resulted in considerable convergence among the ICN members’ merger notification and review procedures (Martin, 2006). Mexico is an active participant in the ICN. It led the Agency Effectiveness Working Group of the ICN for some years, and the former chairman of the CFC, Eduardo Pérez Motta acted as the chairman of the ICN from 2012 to 2013.

Interactions among competition agency officials in the ICN and the OECD Competition Commission are relatively isolated from political pressures, are less hierarchical and focused exclusively on competition policy issues. Such interactions are influential in shaping the behavior of their members, because they promote socialization and mutual learning among the participants (Checkel 2005). They also foster a concern for the reputation of the agency among its peers.

These international pressures facilitated reforms by strengthening the hand of competition policy reformers in Mexico, though their impact was in no way guaranteed. Despite all the support of the OECD, the 2006 reform took 9 months of analysis and negotiations between the CFC and the legislature, during which "the CFC learned the importance of telling a credible story. That is, in order to push such an ambitious project forward, the case had to be made by explaining very clearly what the benefits of the reforms would be for the average citizen" (Pérez Motta and Correa Sada 2013, 21). The 2011 reform likewise took a year to pass the Congress. What is perhaps true is that in communicating and negotiating closely with the judiciary and the lawmakers, the CFC comprehended the importance of political maneuvering and negotiations, and arguably excelled at this under the chairmanship of Pérez Motta (Author’s interviews 2015). Thus while a competition agency’s independence from the executive branch is of utmost importance in the effectiveness of competition policy, the agency also has to be able to maneuver through the political process and have sufficient political backing to carry out its mandate. The CFC has also gradually learned the importance of communicating with societal actors in order to get the support of the public behind it. The OECD pointed to its lack of communication with the public as a weakness in its 1998 and 2004 reports, and the CFC has made a serious attempt to address the issue as well.

6. Conclusions

In this paper, I have argued that the interplay of domestic and international factors can help explain the adoption of the LFEC in 1992 and the reforms that have taken place since 2006 that have made
Mexican competition regime one of the success stories among developing countries. In 1992, NAFTA’s requirement that member states adopt laws to protect competition reinforced the domestic agenda of economic reformers (the main push domestically coming from within the state itself), and led to the adoption of the 1992 law. In the first decade after its establishment, the CFC ran into many problems in its enforcement of competition policy, such as legislative loopholes, insufficient powers to conduct investigations and to sanction breaches, insufficient financial resources, delays and defeats at the district courts, in particular the process of amparos that significantly delayed the conclusion of proceedings and strained scarce resources of the agency, and a lack of support for competition policy among the general public and economic actors.

A series of reforms starting in 2006, and culminating in a fundamental revamp of the law and the CFC in 2014 have addressed many of these problems, and placed the CFC among well-respected competition authorities in the world. The CFC has also self-consciously sought to correct some of these problems that arose in its first decade in operation. For instance, it has started to communicate with the courts much more actively, and since 2006 have run training programs for judges on competition law issues with funding from the Inter-American Development Bank. It has also embarked on an active program of communicating with the general public and private companies to educate them on competition policy matters in order to build up awareness and support.

I argue in the paper that the adoption of legislative changes since 2006 that formally empowered the CFC can be explained by the interplay of domestic and international factors. Domestically, gradually a constituency for stronger competition policy arose, including consumers and firms that have been kept out of markets by dominant firms. These domestic pressures were reinforced by the gentle pressures of a number of international actors. There was no equivalent in 2006 of the NAFTA conditionality that led Mexico to adopt a competition law in 1992, but rather, a group of international experts on competition policy that evaluated the problems in Mexico’s competition regime and suggested solutions. The expert assessments of the OECD on competition policy, and of the IMF, World Bank and the World Economic Forum on the issues of competitiveness in the Mexican economy helped move the domestic debate towards concrete legislative action.

To be sure, analyzing the conditions that enabled reforms to the Mexican competition policy does not provide us with a recipe for success in the developing countries. Nonetheless, some broader conclusions can be drawn from the Mexican experience. Most importantly, international
pressures—in the form of conditionality, financial and sustained technical assistance—alone will not lead to the successful implementation of competition laws in developing countries. Domestic ownership of the law matters for the success of the policy. However, domestic ownership does not only refer to ownership by a small group technocrats in the state apparatus. Until the gradual political opening of the Mexican political system that gave voice to citizens as consumers (starting in 2000 with the election of Vicente Fox as president, the first non-PRI president elected in 70 years), emergence of some consumer organizations and economic actors with a stake in better implementation of competition laws, the domestic impetus for reforms was fairly weak. But once these domestic interests developed, international support in the form of expert opinions, evaluations and reports, helped frame the domestic debate, strengthened the hand of the CFC and pushed the reforms ahead.
References


