

Competition Law and Policy in Mexico



An OECD Peer Review



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ORGANISATION FOR ECONOMIC
CO-OPERATION AND
DEVELOPMENT

COMPETITION LAW AND POLICY IN MEXICO

AN OECD PEER REVIEW

This report was financed by the Inter-American Development Bank

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

Under the OECD Regulatory reform program, a previous assessment of Mexico's competition law and policy was completed in 1998. It concluded that Mexico's competition law was well-conceived, and that Mexico's competition commission ("CFC") possessed strong enforcement powers and important authority to affect direct market regulation by other agencies. The current report*, which was the basis for a three-hour peer review in the OECD Competition Committee on 10th February 2004, concludes that the Commission has matured into a credible and well-respected agency, compiling a remarkable record of achievement given the difficulties of its environment. The degree of general support for competition policy is, however, an open question, and certain deficiencies in statutory authority and judicial review processes constrain the CFC's efficiency. The Commission has also suffered a decline in resources despite an increasing workload. Further, certain features of the CFC's procedures and methods of interface with other government entities reduce its efficacy as a law enforcement agency and competition advocate. The OECD Secretariat report recommends changes that the Commission can itself make to enhance performance, and also suggests certain alterations in statutory authority and procedure. The report comes at an important juncture for the CFC, as the federal administration has announced an intention to enhance the role of both competition policy and the CFC in Mexico's national economic program, and is developing legislative proposals that would, if enacted, implement many of the report's recommendations.

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SUMMARY

This report assesses the development and application during the past five years of competition law and policy in Mexico. It updates a report prepared in 1998 as part of a larger OECD regulatory reform study. The 1998 Report concluded that Mexico's 1993 competition law reflected a well-conceived synthesis of contemporary economic principles. The law created a Federal Competition Commission (the CFC) that possesses both strong enforcement powers and authority to determine whether the absence of effective competition in a market sector warrants regulatory intervention by the government. The previous report noted, however, that there was no clear base of support for competition policy, and that the vigour of the Competition Commission's enforcement record to that point could be questioned.

Five years later, the strengths identified in the initial Report still pertain, and doubts about the CFC's willingness to engage powerful economic interests have largely dissipated. Further, the Commission has matured into a credible and well-respected agency that has compiled a remarkable record of achievement given the difficulties of its environment. The agency still confronts an array of challenges and opportunities for improvement. The degree of general support for competition policy is still an open question, and certain deficiencies in statutory authority and judicial review processes constrain the CFC's ability to address anti-competitive conditions effectively and efficiently. The Commission has also suffered a decline in resources despite an increasing workload, and some features of the CFC's procedures and methods of interface with other government entities reduce its efficacy as a law enforcement agency and competition advocate.

This Report suggests changes that the Commission can make itself, as well as certain alterations in government authority and procedure that the Commission is urged to seek from other branches of government. In the first category, the Report recommends that the CFC:

- provide respondents in Commission proceedings with better incentives to settle cases by consent and thus reduce the volume of *amparo* (judicial review) suits filed against the Commission;

SUMMARY (cont.)

- open a dialog with the Mexican Bar Association to address perceptions among some practitioners that Commission decisions are insufficiently transparent and biased against respondents in CFC complaint cases;
- establish a program to monitor closely regulatory proposals posted for review by COFEMER and submit appropriate comments on proposals that threaten anti-competitive effects;
- maintain a much closer relationship with PROFECO, both to obtain assistance in detecting and prosecuting collusive behaviour and, more importantly, to employ the tools offered by PROFECO for communicating the benefits of competition more effectively to the public;
- assess fines aggressively in cartel cases, refer corporate officers for criminal prosecution, and employ other tools to promote the exposure of collusion;
- undertake more interaction with national business organizations and business chamber consortia to explain and advocate competition policy;
- provide a fuller explanation of its fine imposition decisions to avoid reversal in Fiscal Court review proceedings;
- employ any increase in resources to hire additional professional staff, with particular emphasis on securing expert lawyers;
- adopt criteria for assessing the significance of failing firm conditions in merger cases;
- issue appropriate confidentiality regulations to avoid inappropriate disclosure of sensitive commercial information by judges in amparo suits against the CFC;
- amend the pre-merger notification regulations to clarify the circumstances in which filing is not required for restructuring transactions undertaken by foreign firms with Mexican subsidiaries;
- encourage the identification of economists with appropriate professional expertise for retention by amparo courts as experts in CFC cases;

SUMMARY (cont.)

In the second category, this Report recommends that the Commission seek action by Congress (or, as appropriate, the judicial branch) to:

- require Senate approval of Commissioner appointments to the CFC and establish the CFC's budgetary independence from the Executive Branch;
- increase the Commission's budget allocation;
- empower the CFC to block anticompetitive decisions in trade law proceedings;
- vest the CFC with expanded investigative powers and authority to establish a leniency program for conspirators who voluntarily reveal collusive agreements;
- empower the CFC to remedy structural monopoly problems directly, or at least to vest the Commission with authority to study suspect industries and recommend appropriate remedies to Congress;
- assure that the CFC has an adequate opportunity to participate in all proceedings conducted by federal regulatory agencies, and require that regulatory agencies reply on the public record to the Commission's comments;
- establish a specialised amparo court with economic expertise to hear cases from the CFC and other agencies that deal with economic issues;
- prevent amparo courts from granting inappropriate stays of CFC orders during judicial review;
- streamline the procedures that apply to the collection of fines after judicial review is completed;
- modify the procedural rules for both amparo and Fiscal Court cases so that parties seeking review of Commission orders imposing fines will be required to post a bond assuring payment if the Commission's order is sustained;
- eliminate for CFC cases the existing jurisdictional amount required for appellate review of adverse Fiscal Court decisions.

1. Competition policy in Mexico: foundations and context

This report assesses the development and application of competition law and policy in Mexico since 1998. It updates the OECD's "Background Report on the Role of Competition Policy in Regulatory Reform," prepared in 1997-98 as part of a larger OECD study of regulatory reform in Mexico (hereafter "1998 Report").¹ As did the previous Report, this analysis begins with a description of the background of competition policy in Mexico and the context in which it operates.

Mexico's competition policy was introduced as part of a decade-long reform initiative, begun in the mid-1980s, to end central government control and protection of domestic economic activity and to develop instead a market-based economy. The government ended most domestic price controls and reduced entry constraints. To open the economy to foreign trade and investment, Mexico eliminated most compulsory import licenses, abolished official import prices, reduced tariffs, and adhered to the GATT. Further, in 1994, Mexico entered the North American Free Trade Agreement (NAFTA), followed subsequently by free trade agreements with the European Union and a litany of Latin American countries, so that today virtually all of Mexico's foreign trade is covered by such accords. Trade with the United States and Canada tripled after the implementation of NAFTA, and in the period from the beginning of the liberalisation process in 1984 until 2002, annual imports increased by more than 1000 per cent, while exports increased by 555 per cent. Import liberalisation, as anticipated, beneficially stimulated domestic competition in Mexico's tradable goods sectors.

The government also undertook to privatise hundreds of state-owned commercial enterprises. The largest single effort was the 1990 sale of the telephone monopoly for \$US 6 billion. Eighteen commercial banks were privatised in 1991 and 1992, for a total of \$US 13 billion. Public firms in steel, sugar processing, airlines, TV broadcasting, satellites, airport and seaport facilities, and railroads were sold to private concerns. Licenses and concessions for activities formerly performed by the state, such as seaport services, and the storage, transportation and distribution of natural and liquefied petroleum (LP) gas were auctioned to the private sector, as were licenses for frequency bandwidths covering a variety of broadcast services.

Privatisation sometimes encountered complications, and the process is not yet complete. The peso crisis of the mid-1990s and its associated economic dislocations led to government reacquisition of direct or indirect ownership positions in firms involved in banking, airlines, toll road operation, and sugar processing. Bank workouts in the intervening years

have restored private ownership in that sector, but the other three sectors await resolution. Further, privatisation has made no headway in petroleum. Consequently, the national monopolist Pemex still imposes inefficiencies and distortions on the government and the economy. Nor has much progress been made with respect to electrical energy, although a few licenses have been granted to establish independent power generation facilities.²

Because some of the privatised sectors exhibited natural monopoly characteristics, regulatory regimes were instituted to deal with defects in market operation. Difficulties arose in some sectors where regulatory schemes were not sufficiently well conceived or not implemented at the right time. In telecommunications, the lure of revenue maximisation led the government to sell the existing system to a single entity, and regulatory inadequacies in that sector led to years of quarrelling over how much long distance and cellular competitors should pay the monopoly for network access. In railroads, the government sold off geographic segments of the national system to different buyers, which produced better results than the telephony experience, but disputes have still arisen among the segment operators over access fees to be paid for trackage rights in adjoining regions.

A key element in the government's economic reform was the adoption of a general competition law. Removing trade barriers could not assure competition if private barriers sprang up instead, and import liberalisation could not ensure rivalry in non-traded sectors. Further, as a party to NAFTA, Mexico was committed to the adoption of measures proscribing anti-competitive business conduct.³ In 1993, Mexico therefore adopted the Federal Law of Economic Competition (LFCE),⁴ and created the Federal Competition Commission (CFC) to enforce it. The LFCE's drafters undertook to integrate the best competition policy ideas and practices from around the world. The law treats aggressively the most harmful competitive constraints, and applies an economically sensitive analysis to the more ambiguous forms of conduct by using a market power screen and permitting an efficiency defence. The law's elegant organisation and clear conceptualisation reveal its origin as a product of technical expertise, rather than populist adventurism or political compromise.

The competition policy objectives set out explicitly in the LFCE are: "to protect the competitive process and free market access by preventing monopolies, monopolistic practices, and other restraints of the efficient functioning of markets for goods and services."⁵ Efficiency is the guiding touchstone for the law's application. Other commonly encountered competition policy concerns are subsumed in the efficiency-based analysis. For example, there are no provisions or doctrines about "fairness" or "fair competition," nor about protecting the interests of small enterprises or limiting industrial concentration. And although the law is part of a program

to develop a more market-oriented economy, the law takes no explicit note of the goal of promoting economic growth. The law's underlying rationale contemplates that growth will follow from greater competition and efficiency.⁶

The larger environment in which the law operates is not wholly congenial. The 1998 Report observed that "The level of support for the new direction of competition policy in the wider public or business communities is uncertain."⁷ Five years later, the same can still be said. The development of a constituency for competition policy in Mexico must contend with the fact that concepts of market competition are novel in the Mexican business and government culture. The Mexican Constitution has prohibited monopoly since its ratification in 1917⁸ (and indeed, since the Constitution of 1857). Historically, however, the animus against monopoly was focused on the grant of monopoly patents to private interests by government largesse. The traditional goal of Mexican competition policy was to eliminate the evils of private monopoly by instituting price control and state ownership.

Prior to reform, in business sectors that were not occupied by federally-owned firms, private companies were organised into chambers that fixed prices under the aegis of government authority. Not surprisingly, business chambers exhibited a strong inclination to continue fixing prices even after the government's participation and approval ended. Also, after reform, government sector regulators sometimes appeared to exercise their authority to accomplish results deemed desirable on non-efficiency grounds, such as to develop national champions.

The LFCE and the market-opening reforms were launched during the administration of President Carlos Salinas, of the Institutional Revolutionary Party (PRI). He was succeeded in 1994 by PRI candidate Ernesto Zedillo, whose administration was confronted almost immediately with the collapse of the peso and an ensuing economic crisis. Although strong exports subsequently helped the Mexican economy to recover, ex-President Salinas was blamed for contributing to the crisis and for his alleged involvement in a range of misdeeds. In the political dynamic of Mexico, competition policy and the CFC are not helped to the extent that they are seen as a product of the Salinas era or as a requirement imposed on Mexico by NAFTA.

In a historic shift after more than 70 years of PRI rule, Vicente Fox, candidate of the National Action Party (PAN), won the 2000 national elections. PRI and PAN each won two fifths of the seats in the lower house Chamber of Deputies, but the PRI secured nearly half of the seats in the upper house Senate. In the 2003 elections for the lower house Chamber of Deputies, the share of seats held by the party of the Fox administration (PAN) dropped to 30 per cent, while the share held by the party of the

previous administration (PRI) increased to 44 per cent. The even balance of power has made it difficult to pass significant legislation. Although the new administration has been in place for more than two years, there is still little basis for determining its stance on competition policy. There is a perception that ministers are now more likely to come from business or politics, rather than from the technocratic school that was typical of the last two PRI administrations. Recently, however, in June 2002, President Fox announced that the government is preparing an economic development program in which competition policy will play a prominent role.

During his tenure thus far, President Fox has appointed one commissioner to the CFC. He will have the opportunity to fill more seats, because the terms of three other commissioners will end before the next presidential election in 2006. Legislation now pending before Congress, offered by Deputies affiliated with the PRI and several smaller parties, would give the legislative branch a role in the appointment process by requiring Senate approval of Presidential appointments to the CFC.

The 1998 Report, besides noting the uncertainty of public support for competition policy, noted a concern about public perception of the CFC that appears to have been resolved in subsequent years. The Report observed that:

A number of factors, including the CFC's economics-based approach, its observance of careful, and sometimes time-consuming procedures, and the delays from frequent judicial challenges, as well as the public impression that some of its decisions have accommodated non-competition interests, have led to a public perception that the agency is not strong.⁹

Since 1998, the CFC has repeatedly demonstrated its willingness to confront and aggressively apply the law to powerful economic actors, and there do not appear to be many who still consider the CFC weak on that account. The problem of producing demonstrable results still persists, however, especially because the shower of judicial challenges that the CFC faced in 1998 has grown into a thunderstorm. The CFC has won virtually every case that has risen to the Mexican Supreme Court, which has found numerous portions of the LFCE to be constitutional and has not rendered any definitive decisions finding constitutional defects.¹⁰ Nonetheless, the lower courts have not been so supportive, and the CFC is seen as an easy target for litigious delay at the hands of its prosecutorial targets. This problem extends not only to judicial review of the CFC's procedures and case determinations, but also to the collection of the fines imposed by the CFC for unlawful conduct.

The arrival of the Fox administration is the most significant change since 1998 in the environment faced by competition policy and the CFC. The Supreme Court has supported the CFC's statutory scheme. And the legislative branch has not amended the LFCE during the past five years. On the contrary, powerful interests have repeatedly failed in their efforts to evade CFC oversight by having the law changed. In both 2000 and 2001, Congress rejected proposals to amend the LFCE by exempting commercial airline services. The CFC opposed the legislation, which was designed to allow the airline assets held by the government to be consolidated as a single flag carrier. Likewise, in 2001 and 2002, during the development of revised telecommunications legislation by a congressional conference, the CFC successfully resisted attempts to strip the CFC of its authority to declare the existence of substantial market power in that sector. With respect to the Regulations implementing the LFCE, there have been no amendments to their provisions since initial promulgation in March 1998. There is one new piece of legislation that affects the CFC (and the entire federal government). The Federal Law of Transparency and Public Access to Governmental Information was enacted in 2002, but its most significant requirements became effective on June 11, 2003. It requires a higher degree of transparency from government agencies, a topic treated later in this Report with respect to the CFC.

2. Coverage of the competition law

The LFCE is designed to give operative force to anti-monopoly provisions set out in Article 28 of the Mexican Constitution, and an exposition of the coverage of Mexico's competition law properly begins with the constitutional text. Article 28 opens with a broadly couched prohibition of "monopolies, monopolistic practices, [and] State monopolies." It then provides, however, that the functions exercised exclusively by the State in specified "strategic areas" will not be deemed to constitute monopolies for this purpose (although, of course, they are in fact). The sectors presently listed in Article 28 as strategic areas are postal services, telegraph and radiotelegraphy, petroleum and other hydrocarbons, basic petrochemicals, radioactive minerals, nuclear energy, electric power, and the functions of the central bank in producing coins and paper currency. The list may be contracted only by constitutional amendment, which requires a two-thirds majority of both houses of Congress as well as approval by a majority of the state legislatures. Congress can expand the list simply by enacting legislation, provided that the basis for ascribing "strategic area" status is duly established. Other provisions in Article 28 stipulate that exclusionary privileges accorded to copyright and patent holders also do not constitute monopolies, and the same treatment is likewise accorded to labour associations and export trade associations.

The LFCE reflects and further details the boundaries of the constitutional exemptions. Article 4 restates the strategic area exclusion, but adds the important proviso that State-owned enterprises are subject to the law with respect to monopolistic practices that are not specifically within a strategic area's scope.¹¹ LFCE articles 5 and 6 repeat that legally constituted labour associations and export trade associations, respectively, do not constitute monopolies. The latter exception is constrained by several additional requirements, including that association membership must be fully voluntary and that organisation of the association must be in compliance with the law of the association's domiciliary state.¹²

Save for these exceptions, the LFCE is applicable, by its terms, to "all economic agents," expressly including government agencies (article 3), and to "all sectors of economic activity" (article 1). Thus, the state, its agencies, and all state-owned commercial enterprises operating outside the strategic areas are covered. When a government agency is acting as a regulatory authority and not as an economic agent, however, the CFC ordinarily has no law enforcement jurisdiction. If the government entity is engaging in regulatory conduct that inappropriately restricts competition, the Commission may issue an opinion to the agency in question, but not an order with binding legal effect. On the other hand, the LFCE provides no

exception or protection for anticompetitive conduct by a private party on the grounds that the conduct is authorised by a government agency or official. The CFC rejects such a defence as a matter of principle, although the offender may receive a reduced penalty

The CFC is authorised to deal with anti-competitive government regulation in one circumstance: where a state or local agency undertakes to restrict interstate or foreign commerce. Article 117, section V of the Mexican Constitution reserves the regulation of such commerce to the federal government and prohibits state interference. LFCE article 14 implements this Constitutional provision by providing that “the acts of state authorities of which the direct or indirect objective is to prevent the entry or exit of domestic or foreign goods or services into or from the state’s territory, shall have no legal force or effect.” Although the Commission cannot order the state to repeal the offending regulation, LFCE article 15 empowers the CFC to declare that the regulation constitutes an interstate trade barrier. This effectively makes the regulation void under Article 117, section V, and private parties can then ignore the regulation with legal impunity. The CFC’s usual practice is first to issue a recommendation urging repeal. If the state entity takes no action, the CFC then issues a public declaration that the regulation constitutes an interstate trade barrier.¹³

Regulatory commissions have been established for several economic sectors, including telecommunications (the Federal Telecommunications Commission, or COFETEL, which is in the Ministry of Communications and Transportation), electricity and gas (the Energy Regulatory Commission, or CRE),¹⁴ insurance and sureties (the National Insurance and Sureties Commission), and pension funds (the National Pension Funds Commission). The transportation sector, including rail, aviation, road transport, and seaports, is regulated directly by the Ministry of Communications and Transportation without the intermediation of a commission. Various features of the financial sector are controlled by the Ministry of Finance, the National Banking and Securities Commission, and the Mexican central bank. None of these government entities have authority to apply the LFCE, nor are any of their associated market sectors exempt from it. A signal feature of many of these sector regulatory schemes is that they create an explicit role for the CFC. Specifically, the CFC must determine that there is an absence of effective competition in a market (or, uniquely for the telecommunications sector, that an economic agent has substantial market power) before the sector regulator can impose price controls. In addition, in some sectors, economic agents who wish to bid in a sector regulator’s auction, or to apply directly through an administrative proceeding for a concession, license, or permit, must first obtain a favourable CFC opinion. The CFC can disapprove the applicant’s request or,

where the auction rules so provide, establish conditions that will apply to the applicant if it should win.

A final form of government market regulation arises from yet another provision in Article 28 of the Mexican Constitution. Besides banning monopolies and creating the “strategic area” and other exemptions discussed previously, Article 28 empowers the federal government to set maximum prices for articles or services deemed “necessary for the national economy or popular consumption.” Article 7 of the LFCE implements this provision. The Federal Executive is authorised to determine which products are eligible and the Ministry of Economics sets the price ceiling after negotiation with interested parties. Article 7 provides that agreements established between the Ministry and producers or distributors to implement such price ceilings are not a violation of the LFCE. In the mid-80’s, about 70 percent of all products were subject to some form of price control. By the time of the 1998 Report, the only products still on the list were tortillas and medicines. Tortillas were subsequently removed, and the Ministry of Economics is presently evaluating the removal of medicines. As discussed later in this report, however, distribution of liquefied petroleum (LP) gas was added to the list in 2001.

One remaining aspect of the LFCE’s coverage that deserves attention here is its extraterritorial applicability. The statute does not make any distinction between foreign and domestic actors and the CFC stated at the outset that the LFCE “applies to all agents whose actions impact markets in the Mexican territory.”¹⁵ The CFC recognises, however, that founding enforcement action on an “effects” test is fraught with a range of difficulties, from obtaining personal jurisdiction to dealing with adverse reaction from affected foreign countries. The Commission has avoided a confrontational posture on this issue, obtaining jurisdiction over foreign entities in several instances by voluntary submission of the parties.¹⁶ It has also addressed transnational enforcement issues through cooperative agreements with foreign antitrust enforcement authorities, and by adopting regulations designed to exempt certain foreign transactions from its pre-merger notification requirements.

3. Content and application of the competition law and related provisions

The LFCE implements the Constitutional ban on monopolies, not by making monopolies unlawful as such, but by prohibiting and penalising the practices by which monopoly power might be attained or strengthened. The Regulations implementing the LFCE, published in March 1998, develop specific aspects of the law's provisions, both substantive and procedural. Under the LFCE, practices are classified as either absolute (Article 9) or relative (Article 10). "Absolute" monopolistic practices are prohibited per se and agreements to undertake them are legally void. Such practices cannot be defended by claiming that they are efficient, as their inefficiency is presumed conclusively by the law. In contrast, "relative" monopolistic practices may not be found illegal unless the respondent is found to have "substantial power" in a defined relevant market and fails to prove an efficiency defence.

The LFCE provides administrative sanctions, including corrective conduct orders and fines, for monopolistic practice violations. Maximum fine amounts are indexed, so that they will reflect inflationary (or deflationary) changes in the economy. The reference used is the minimum daily wage (MDW) for the Federal District of Mexico (i.e., Mexico City), set most recently in December 2002 at 43.65 pesos. For absolute practices violations, the maximum fine factor is 375,000 (so the maximum fine is about \$1.6 million USD). For unlawful relative practices, the maximum fine factor for most violations is 225,000 (\$932,000 USD). The maximum fine factor for violations arising under the "catch-all" provision in Article 10, section VII is set lower, at 100,000 (\$414,000). A separate provision in LFCE Article 37 permits the CFC to impose, in egregious cases, an alternate fine equal to the greater of 10 per cent of the violator's annual sales or 10 per cent of the violator's assets. The CFC may also refer certain violations of the LFCE to the Public Prosecutor for consideration of criminal charges against the responsible individuals. This option applies in cases involving (1) monopolistic practices that severely affect the market for necessary goods, (2) the provision of false information to the CFC, and (3) failure to comply with a CFC final resolution as to which all appellate procedures have been exhausted.

3.1 Horizontal agreements: rules to prevent anti-competition coordination

The absolute monopolistic practices that are subject to per se prohibition under Article 9 include four categories of hard-core horizontal agreements among competitors: price fixing, output restriction, market division, and bid

rigging. Article 9 also specifies as unlawful certain particular kinds of conduct within those categories. For example, the price fixing clause prohibits information exchanges with the purpose or effect of fixing or manipulating price; the output restriction clause prohibits commitments relating to the volume or frequency with which goods and services are produced; the market division clause covers potential as well as existing markets; and the bid rigging clause covers agreements respecting both participation in auctions and establishment of the prices to be bid. One kind of horizontal agreement -- collusive boycotts -- appears in the Article 10's specification of "relative" monopolistic practices, a listing otherwise devoted to vertical practices. Additional horizontal practices may be treated as relative practices under Article 10, section VII, which is a catch-all provision covering any actions "that unduly damage or impair the process of competition and free access to production, processing, distribution and marketing of goods and services."

The LFCE's absolute prohibition of hard-core horizontal agreements has been a critical weapon in the elimination of publicly sanctioned, but privately arranged, price constraints. Until 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 industry members. Industries were organised into "business chambers" subject to the supervision of the Ministry of Economy.¹⁷ As noted above, the laws relating to business chambers were subsequently revised to limit their power by making membership voluntary rather than compulsory, but their inclination to collude has persisted.

In the CFC's early years, much of its enforcement work with respect to absolute practices was focussed on rooting out the anti-competitive habits that the system of business chambers and price controls had traditionally encouraged. The March 1998 LFCE Regulations include provisions directed specifically to this topic. The provisions specify that the CFC will deem that certain circumstances (such as two or more competitors adhering to a price announced by a business chamber) will constitute circumstantial evidence of price fixing. Since 1998, the CFC has continued to bring price-fixing cases involving business chambers, but at a considerably reduced volume compared to the previous five years. Recent cases have pursued business chambers operating in such markets as tourist transportation services, corn tortilla dough, customhouse brokerage services, and blue agave (the main ingredient used to produce tequila). The only instance in which the Commission has made a referral to the Public Prosecutor for criminal prosecution arose in a 2000 price fixing case involving an association of tortilla manufacturers. The Prosecutor declined to proceed because sub-

groups of the association had agreed on different prices and there was no agreement among the association's members to fix a single price.

CFC cases against collusion by small firms (not involving a business chamber) were also frequent in the early years of the LFCE. Small businesses were often unaware that price fixing was unlawful and contended that joint action was necessary to compete effectively against larger rivals. Recognition that the Act exists and permits no such defence appears to have spread, as cases against small firms have dwindled to a trickle. Of course, this may be because the firms have decided to compete as the law contemplates or because they have become more sophisticated about disguising collusion. Small firms are permitted to co-ordinate some activities without violating the LFCE by joining together in "integrating companies" created under a program administered by the Economics Ministry. The program is designed to help small and medium sized firms take advantage of scale economies and purchasing efficiencies. Such joint ventures are typically too small to warrant filing under the CFC's pre-merger notification rules. The CFC considers that the small firms participating as partners or shareholders in such an entity are not acting as competitors. Consequently, the establishment of a single price at which the entity sells its products does not constitute an unlawful monopolistic practice under the LFCE.

Outside the business chamber and small business arenas, the CFC has brought a variety of absolute practice cases since 1997, including bid rigging with respect to medical equipment auctions and sales to medical institutions of radiographic developing chemicals, as well as price-fixing cases involving milk, surgical sutures, beer, and airline ticket distribution. It has also brought follow-on actions against the Mexican subsidiaries of companies involved in the international lysine and citric acid cartels. The CFC continues to monitor recently privatised or deregulated sectors, and recently brought a horizontal collusion case in LP gas distribution market. The CFC suspects the existence of collusion in various other markets as well, but has not been able to develop sufficient evidence to warrant prosecution. The Commission believes that it needs better tools to expose surreptitious price-fixing conspiracies, including authority to conduct unannounced searches for business records, and explicit statutory authority granting immunity from LFCE penalties to conspirators who reveal collusive agreements.

3.2 Vertical agreements: rules to prevent anti-competitive arrangements in supply and distribution

All varieties of vertical agreements are treated as relative monopolistic practices. Article 10 specifically identifies five types of vertical conduct: (i)

vertical market division, (ii) resale price maintenance, (iii) tied sales, (iv) exclusive dealing, and (v) refusals to deal. The sixth and final category specified is the collusive boycott, a species of horizontal behaviour that frequently has a vertical component. Other types of vertical agreements may be reached under the catch-all provision in Article 10, section VII. The catch-all provision is implemented by Regulation 7, which adds five items to the list of relative practices: (i) predatory pricing, (ii) exclusive dealing in exchange for special discounts, (iii) cross-subsidisation, (iv) discrimination in price or conditions of sale, and (v) raising rivals' costs. Relative monopolistic practices are illegal only if they demonstrably harm competition in the case at issue. In the language of Article 10, the practices must "improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favour of certain persons." More importantly, a relative monopolistic practice is unlawful under the LFCE only if the responsible party has substantial market power in the relevant market.¹⁸ The Regulations clarify the criteria applied both for defining the relevant market and for determining the existence of market power,¹⁹ and also provide that a respondent may offer a defence on the grounds of efficiency (for which defence the respondent bears the burden of proof).

The cases pursued by the CFC under Article 10 since 1997 reflect a diversity of practices. In the area of exclusive dealing, for example, CFC actions resulted in the termination of (1) a contract between a TV broadcasting company and the Mexican Football Federation that barred any other TV company from broadcasting national soccer team matches, and (2) contacts between a market research firm and retail store chains that excluded other market researchers from access to the chains' sales data. In an important case involving Pemex, the CFC attacked contracts between Pemex and gasoline station operators that limited the stations to selling automobile lubricant brands specified by Pemex. Lubricants had been removed from the scope of the petroleum "strategic area" in 1990, and this case therefore involved a striking example of behaviour by a state monopolist that was nonetheless subject to the LFCE.

Exclusive dealing contracts in beverage distribution have been a recurring issue for the CFC. In 2000, responding to a complaint from PepsiCo and two Mexican soft drink companies, the CFC commenced an investigation of contracts between Coke and thousands of small retail outlets under which the stores limited themselves to selling Coke brands in exchange for a free refrigeration unit or store sign. Coke enjoys a 72 per cent market share of the soft drink market in Mexico, and the CFC concluded in 2002 that the contracts were unlawful. In beer retailing, meanwhile, the Commission commenced an investigation in 1999 of major breweries Grupo Modelo

(Modelo) and Cervecería Cuauhtémoc Moctezuma (CCM, a subsidiary of Femsá) for entering into contracts with state and local authorities that mandated exclusive local distribution of their brands. The companies settled in 2001 by agreeing to terminate the contracts. That case did not, however, address other exclusive contracts that the brewers had established directly with retailers. Just recently, on May 29, 2003, the Commission determined to open a nationwide investigation of exclusive contracts between beer brewers and retailers. This investigation will provide a forum for the Commission to address complaints that exclusive distribution contracts by Mexican brewers have been treated differently than exclusive contracts by foreign soft drink manufacturers.

Although the LFCE does not mention predatory pricing, the Regulations identify as a relative monopolistic practice the “sustained sale of goods or services at prices below their average total cost or their occasional sale below average variable cost.” In the past five years, the Commission has addressed predatory pricing claims on three occasions. In two matters, one in 1998 and the second in 2002, the CFC rejected complaints alleging predation in inter-city bus fares. The third matter is a long-running case against Warner Lambert for predatory pricing in the chewing gum market. After two rounds of proceedings that began in 1994, the CFC found and affirmed in 1998 that Warner Lambert dominated the chewing gum market with a share between 65 percent and 73 percent, that it had power to control price, that its prices were persistently below average total cost, and that the complaining company had lost measurable market share as a consequence of Warner Lambert’s conduct.²⁰ The CFC’s 1998 resolution, which imposed a fine and injunction, was later overturned and remanded by a reviewing court. In 2002, the Commission issued and reaffirmed a new resolution, restating its original determinations.

The CFC’s predatory pricing Regulation, while treating predatory pricing as exclusionary device, does not include in the applicable legal standard any consideration of whether the perpetrator will be able to recoup the costs of his predation once the target exits the market. The 1998 Report concluded that the CFC’s predatory pricing test would likely result too often in economically inappropriate determinations of predation and urged the CFC to adopt “a clear recoupment requirement.”²¹ The CFC took no action on this recommendation until the occasion of the present review, when it agreed to publish criteria under which a predatory pricing determination would require the Commission to find “good probabilities of recoupment.” The Commission stated that it had, in fact, employed that standard in its previous cases. The Commission also noted the dearth of predatory pricing cases on its docket and observed that the concern about finding frequent violations was not substantiated. Finally, the Commission expressed doubt that “a clear

recoupment requirement” was practicable if it required finding a certainty of recoupment. The Commission therefore considers its test of probable recoupment to be more appropriate. The subject is now uncertain, though, since the Supreme Court issued a decision in the Warner Lambert case on November 25, 2003, declaring unconstitutional the catch-all provision of the law (article 10, section VII) on which the CFC had based its regulation against predatory pricing.

The CFC has seen very little action with respect to price discrimination. The one conventional price discrimination case considered during the past five years resulted in a 1999 determination that the public agency responsible for airport management at the Cancun airport had acted unlawfully by charging lower airport access fees to taxi fleets than were charged to tourist transportation agencies. In 2002, the CFC commenced an investigation into allegations that Wal-Mart de Mexico (Walmex) was acting as a power buyer by extracting discriminatory prices from suppliers. The CFC examined whether Walmex was demanding that suppliers give it lower prices than those offered to other retail chains. The investigation was closed in early 2003 without a finding of violation. Walmex agreed to advise its purchasing agents that price negotiations with suppliers were required, as a matter of corporate policy, to focus exclusively on prices charged to Walmex without any reference to prices charged to Walmex competitors.

One interesting case under Article 10 involved actions undertaken by a group of LP gas distribution companies to raise a rival’s costs. The target rival had obtained a permit to construct a gas storage plant. The CFC found that the perpetrators had cooperated to delay inauguration of the new plant for twelve months by filing injunction actions in court against the construction of “dangerous buildings” and by organising street demonstrations outside the offices of local authorities. Two other CFC actions also involved joint conduct in the nature of a collusive boycott. A case in 2000 involved cooperation between a wheat distributor and an association of agricultural product suppliers whereby a rival of the distributor was denied access to imported supplies of high-protein hard wheat. And a case in 2001 found that tortilla makers and flour mills in Yucatan had agreed that flour would not be sold to new tortilla makers located in the vicinity of incumbent producers.

The CFC has also brought a series of cases charging relative monopolistic practices by Telmex, the dominant telephone services provider. One example in 2000 involved a proceeding in which the CFC found an unlawful refusal to deal. Consumers calling 800 “toll free” numbers operated by long distance companies had to purchase a Telmex pre-paid “Ladatel” card if they wished to make the call using a Telmex public phone. Customers using public phones to call 800 numbers operated by Telmex were not subject to

this expense, and Telmex refused to contract with competing operators so that they could absorb directly the cost of public phone access. The competitors, of course, could not effectively market 800 number services to companies because companies did not want callers to pay for public phone access when making a “toll free” call.

3.3 Abuse of dominance: rules to remedy monopoly as such

Although monopoly is prohibited both by the LFCE and by the Constitution, no section of the law deals expressly either with monopoly as such or with abuse of dominance. Single-firm practices that may be defined as abuse of dominance or monopolisation in other countries are treated as relative monopolistic practices under Mexico’s law. In particular, the LFCE does not address abusive (high) pricing. Unlawful conduct is defined solely in terms of exclusionary practices at the expense of competitors or other firms in the chain of distribution, and not in terms of exploitative practices at the expense of consumers. Exploitation of market power by charging supra-competitive prices to consumers is expected to be self-correcting, as such conduct will normally attract new entrants. The prospect that new entry may be forestalled by intrinsic market conditions is addressed not by the LFCE, but by provisions in specialised sectoral laws. As noted previously, the regulatory schemes established for the telecommunications sector and for road, air, sea, and rail transportation all contemplate price regulation if the CFC finds an absence of effective competition in the relevant market (or, in telecommunications, the existence an economic agent possessing substantial market power). The involvement of the CFC in these markets is discussed later in this report.

The LFCE’s approach to treating dominance solely in the context of particular practices reflects the precept, drawn from the experience of others, that using legal tools to restructure monopoly is a treacherous enterprise and risks doing more economic harm than good. The 1998 Report observed, however, that problematic circumstances would arise if the CFC faced a highly concentrated industry characterised by high profits and a lack of new entry, but for which no evidence of unlawful monopolistic practices could be found.²² In the absence of available structural remedies under the LFCE, and outside the sectors subject to specialised regulation, few means would be available to expose such an industry to real competition. The Report noted that the introduction of import trade was one possible approach, but recognised that some concentrated industries are protected from import competition by economic practicalities or legal barriers. The Report’s final recommendations included the following passage:

[I]t is worth considering whether to add provisions to the LFCE to deal more directly with the problem of monopoly as a structural

matter. To be sure, relief is difficult to achieve at acceptable costs. But it could be useful to have the tools available, kept in reserve for occasional use in exceptional, but important, cases in which it is difficult to establish clearly illegal monopolising conduct (perhaps because victims are reluctant to come forward), yet structural market power is unacceptably persistent.²³

The CFC advises that it is presently developing proposed monopolisation legislation of the kind contemplated by the Report. The legislation would amend the LFCE, empowering the Commission to prosecute monopolists who injure consumers by exploiting their market power to raise prices and restrict supply. The CFC considers that such authority could be appropriate for dealing with highly concentrated Mexican industries like cement, where profit margins are high and domestic prices appear to exceed significantly those charged for Mexican cement exported to foreign markets. The CFC has investigated the cement industry on several occasions in the past without detecting any unlawful monopolistic practices.

3.4 Mergers: rules to prevent competition problems arising from corporate amalgamations

Article 16 of the LFCE prohibits mergers whose objective or effect is to reduce, distort or hinder competition. Article 17 requires the CFC, in assessing mergers, to consider whether the merging parties would be enabled to fix prices unilaterally, substantially restrict competitors' access to the market, or engage in unlawful monopolistic conduct. Article 18 adds the requirement that, in analysing mergers, the Commission must identify the relevant market and determine market power. The CFC's March 1998 Regulations include a treatment of relevant market definition and market power determination,²⁴ as well as language permitting merging parties to defend a merger by proving the existence of efficiencies. The LFCE empowers the Commission to sanction an unlawful merger by ordering partial or full divestiture, as well as other conduct relief and a fine of up to 225,000 MDW (\$932,000 UDS).

Other guidance about merger analysis is provided in "criteria" statements issued by the CFC. The Commission's 1993-94 Report included a discussion entitled "General Criteria for Assessing Mergers" that addressed jurisdiction, notification procedures, and deadlines, as well as such substantive matters as the assessment of competitive effects and of covenants not to compete. The text noted that the Commission would apply "concentration indices" to determine if post-merger concentration in the relevant market was significant, but provided no further information about the indices or analysis employed. In June 1998, the Commission responded to business community concerns that the agency's standards for analysing

mergers were not transparent or comprehensible by issuing a statement on concentration indices.²⁵ The statement, designed to supplement the treatment of market definition that had appeared in the March 1998 Regulations, describes two concentration indices employed by the CFC. One is the familiar Herfindahl index (HHI); that is, the sum of the squared market shares of all the firms in the market. The statement establishes a non-binding “safe harbour” for combinations that increase the relevant market’s HHI by less than 75 points, or that result in an HHI below 2000. The second is an “index of dominance,” which is calculated as the sum of the squares of each firm’s share of the HHI. A transaction is considered unlikely to affect competition adversely if it does not cause the index of dominance to increase, or if the resulting value of that index is less than 2500. The statement notes that these concentration-based indicators are not determinative, and that the CFC will also examine other factors that are relevant in determining whether the merged entity may obtain power to control price or substantially restrict competitors’ access to the market.

LFCE Article 20 establishes pre-merger notification requirements that, like fines for violations, are indexed to the minimum daily wage (MDW). Notification is required if a transaction exceeds 12 million times MDW (about \$49 million USD), or if it results in holding more than 35 percent of the shares or assets of a firm with sales or assets exceeding that amount. Notification is also required if the parties’ assets or annual sales total more than 48 million times MDW (\$199 million USD) and the transaction involves an additional accumulation of assets or shares of over 4.8 million times MDW (\$19.9 million USD). Regulation 20 provides for filing a short form notification if the parties certify that the transaction’s lack of anticompetitive potential is “plainly manifest.” Regulation 21, section II permits an even shorter notification to be filed within five days following consummation of restructuring transactions, provided that the parent entity has held or controlled at least 98 per cent of the merging subsidiaries’ shares for the preceding three years.

Foreign mergers must in principle be notified to the CFC if they produce effects within Mexico, but Regulation 21, section I waives notification for transactions involving shares of foreign entities in which the acquirer obtains no new Mexican assets or shares. The prime situation covered by this exemption is the acquisition by one foreign firm of another foreign firm that sells products in Mexico through independent distributors. The exemption applies even if the acquirer has a Mexican subsidiary that competes with the target firm, because the transaction involves only foreign shares and the acquirer obtains no new Mexican assets. The CFC’s merger office has recently been interpreting this exemption to cover certain restructuring transactions involving foreign firms with Mexican subsidiaries.

For example, a foreign parent with one subsidiary in Mexico and another subsidiary elsewhere may wish to merge the two. If the foreign subsidiary is the acquirer, the transaction is ostensibly outside Regulation 21, section I, because the transaction involves Mexican shares that the acquirer did not previously possess. The CFC is nonetheless willing to waive filing in this situation because the acquisition has no competitive implications and because the parent entity obtains no new Mexican assets even though the acquiring subsidiary does.²⁶

All notified transactions are subject to CFC examination, a process for which the statute establishes strict deadlines. The CFC has done an admirable job in meeting its obligations during the years from 1993 to 2003, completing non-complex cases in an average of 27 days against the statutory limit of 45 days. Cases in which the CFC requested additional information were resolved in an average of 60 days against the statutory 80 day limit. And high complexity cases, for which the statute allots 200 days, were resolved in an average of 109 days. Failure to file notification of a reportable merger is subject to a fine of up to 100,000 times MDW (\$414,000 USD). The LFCE does not, by its terms, prohibit consummation of a notified merger during the period of the Commission's examination. The CFC, however, invokes LFCE article 19 to order that suspect transactions be held in abeyance until the Commission reaches a final resolution. Notified transactions that receive CFC clearance cannot thereafter be attacked (unless the clearance was based on false information), and although the CFC may contest a merger for which notification was not required, it may do so only within one year after the transaction is consummated.

Between its establishment in mid-1993 and the end of 1997, the CFC concluded 544 merger reviews. The number of concluded reviews for the period from 1998 to 2002 was 1287, for a total of 1831.²⁷ Only a relatively few transactions (40) were subjected to conditions during the last five years, and even fewer (11) were rejected outright. The remaining transactions were either authorised (1094) or treated as withdrawn, dismissed or non-filed cases (142). Thus, of the 1145 transactions subjected to review on the merits, 51 (or 4.5 per cent) were blocked or conditioned. Among the significant transactions that the CFC has rejected since 1997 are (1) Coke-Cadbury (acquirer's share of soft drink market would increase seven points to 71 per cent); (2) Televisa-Radio Acir (acquisition would impair competition for broadcast advertising by creating a firm with dominant channel holdings in both television and radio), (3) Ferromex-Ferrosur (transaction would combine railways in two of the three adjoining geographic segments into which the Mexican railway system had previously been divided for privatisation), and (4) Bestfoods-Kraft (acquisition by dominant firm of its principal rival in soup and soup stock market).

On the other hand, the Commission has not sought to block transactions that were not fundamentally anti-competitive, even if they involved large entities or foreign acquirers. Most prominently, the Commission cleared the merger between Citicorp and Banamex, Mexico's second largest bank, subject only to certain divestitures in ancillary banking service markets. Other cases in which the CFC permitted transactions but imposed conditions include (1) Guinness-Grand Metropolitan (merger of alcoholic beverage manufacturers would create a firm with a 65 per cent share in the whiskey market, requiring divestiture of Metropolitan's "J&B" brand), (2) Sara Lee-Canon (acquisition would produce a firm with a 56 per cent share of the hosiery market, requiring divestiture of certain brands and productive capacity), (3) Monsanto-Cargill (acquisition of Cargill's assets would produce a firm with a 60 per cent share in the corn hybrid seed market and a 56 per cent share in sorghum hybrid seeds; Monsanto required to divest a hybrid seed production plant in Mexico, cease using Cargill's trademark, and grant a five year license for the production of seeds under the Cargill name), and Assa Abloy-Phillips (acquisition of four Phillips brand lines would give Assa Abloy a dominant position in market for padlocks and similar products, requiring divestiture of two brands).

One 2002 merger case involving an acquisition of bandwidth licenses for wireless "pcs" telephony services offers an example of the CFC's efforts to promote competition in a regulated sector of the economy. Bandwidth licenses for wireless cellular telephony were originally granted by the Mexican government in 1990. The country was divided into nine geographic regions and two licenses were granted in each – one to Telmex and one to an independent operator. In 1997, the government offered additional bandwidth licenses for personal communication service ("pcs") telephony, a digitised technology that competes with cellular but uses different frequencies. The CFC participated in developing bandwidth caps that limited the number of cellular and pcs frequencies that any one operator could obtain. The caps were designed to encourage the entry of four to five wireless operators (cellular and pcs) for each geographic region. In 2002, Telefónica Moviles, a Spanish firm operating wireless cellular services in four of Mexico's nine regions, sought to acquire Pegaso Telecomunicaciones, a Mexican firm that held pcs licenses for all nine regions. After assessing existing conditions in the wireless telephony market, and recognising in particular the difficulty of competing with Telmex in that market, the CFC decided to permit the transaction. It reached that conclusion even though the practical effect was to vest Telefónica Moviles with more bandwidth than was permitted under the caps applied in the 1997 allocation proceedings.

A final case of importance from the last five years arose as a request for a CFC opinion, rather than from a merger notification. In late 1994, Mexico's

two major domestic air carriers, Aeroméxico and Mexicana, failed and both were taken over by creditor banks. In 1995, the banks sought to create a holding company, with the acronym CINTRA, that would operate the two airlines and undertake to improve their financial situation. The consolidation required clearance from the CFC, which permitted the creation of the holding company but imposed conditions designed to maintain competition between the two airlines: separate accounts, independent management, and performance monitoring by a CFC consultant. Subsequent changes in the creditor banks' capitalisation and ownership during Mexico's peso crisis led to the government holding a controlling interest in CINTRA through the IPAB (Institute for the Protection of Bank Savings). In 2000, the IPAB and several creditor banks that still held shares in CINTRA requested the CFC's views on their plans to divest ownership of the airlines to a single purchaser.

The CFC's response observed that the two airlines typically served 80 per cent of Mexico's domestic airline passengers, and that an analysis of 41 major city-pair routes showed numerous markets in which the concentration indices would increase far in excess of permissible levels. The Commission concluded that entry barriers constrained market contestability and that economies of scale did not dictate a conclusion that only one company could be viable in the Mexican domestic air service market. The CFC therefore determined that the two airlines would have to be sold separately to independent owners, or else the resulting entity would constitute an unlawful concentration subject to attack under the LFCE. Dissolution of CINTRA is still pending at present due to adverse economic conditions in the airline industry associated with the events of September 11 and in Iraq.

Neither the LFCE nor the Commission's Regulations establish an explicit "failing firm" defence. The 1998 Report noted that a merging party's financial weakness "may count in the [CFC's] assessment of likely competitive effects, but beyond that there are no principles describing how it is to count, and what presumptions, if any, are applied."²⁸ The Report concluded with the comment that "in merger review, more transparency in the treatment of the competitive effect of poor financial health would be welcome."²⁹ The CFC confirms that failing firm considerations are taken into account in evaluating potential harm to competition. Indeed, the Commission notes that this was one of the factors leading to the acceptance of CINTRA's formation in 1995 and of the more recent formation of a government holding company to operate several failed sugar processing firms. Until recently, however, the Commission had not taken any action to issue criteria or other formal guidance respecting application of the failing firm defence. On June 26, 2003, the Commission announced that it expected to issue merger guidelines by June 2004 and that the guidelines would include provisions dealing with failing and bankrupt firms.

Similar to the Commission's responsibilities for merger review under the LFCE is its role in determining which economic agents may participate in privatisation proceedings and in auctions for concessions, licenses, and permits issued by the federal government. The Inter-ministerial Privatisation Commission (CID) has provided by rule that a favourable Commission opinion is a necessary condition for prospective participants in every public auction to divest government owned companies. Also, the Federal Telecommunication Law, the Natural Gas Regulations, the Railroad Services Law, and the Satellite Services Regulation all require a favourable CFC opinion as a condition for economic agents who are interested in obtaining concessions or licenses issued by sector regulators through a public auction or directly through an administrative proceeding. The procedures for assessing prospective participants in privatisation and auction proceedings differ from those for mergers, and vary from program to program. There are no asset thresholds like those applicable to pre-merger notification, and deadlines for Commission action depend on specific auction rules. In assessing prospective auction participants, the CFC considers the implications of supply conditions and the participants' market power. As for mergers, relatively few applicants have been opposed or subjected to conditional approval.

Between its establishment in mid-1993 and the end of 1997, the CFC resolved 322 privatisation and auction matters. The number concluded for the period from 1998 to 2002 was 1242, for a total of 1564. The total for the more recent period is skewed due to the filing in 2002 of 738 notices of intent to seek LP gas distribution permits. The regulations applicable to such permits require only that the party notify the CFC in advance of the intended application. The CFC has the option to bar the party's participation by filing an objection, but an affirmative clearance from the CFC is not required as it is under other regulatory schemes. The CFC did not object to any of the LP gas applicants, and subtracting those notifications produces a new total of 504 matters for the most recent five year period. Of those 504 matters, 404 were approved, 12 were rejected, 16 were subjected to conditions, and the remaining 72 were withdrawn, dismissed, or otherwise discharged. Thus, of the 432 applications reviewed on the merits, 28 (or 6.5 per cent) were blocked or conditioned, compared to 4.5 per cent for regular mergers.

The volume of privatisation proceedings has diminished in recent years as the process has played out across the Mexican economy. Significant matters in which the CFC participated during the last five years include the sale of railway system assets, and airport and seaport facilities. In a 1998 proceeding involving an inland grain storage facility, the CFC determined that a company affiliated with a railroad would be required to sell a seaport grain terminal if it won the bid. Also in 1998, the CFC considered the

privatisation of Grupo PIPSA, Mexico's only newsprint manufacturing company. The Commission concluded that the availability of imported newsprint made disaggregation of PIPSA's manufacturing plants unnecessary, but recommended that any sale of PIPSA to a publishing company should require the purchaser to guarantee non-discriminatory availability of newsprint to competing publishers. In 2000, the CFC rejected the participation of Gas Natural de México (GNM) in auctions for natural gas distribution permits for the Guadalajara region. The Commission noted that GNM already held six of twenty available permits for the region and that acquiring a seventh would establish GNM as a dominant actor in the market.

The provision of fixed satellite services through Mexico's three existing satellites was privatised to a single firm, SatMex, in 1997. In 2000, the CFC raised no objection to any of the applicants that had requested direct allocation of concessions to employ frequency bands associated with foreign satellites. The Commission took this position although one of the applicants was Enlaces Integrales, a SatMex subsidiary. There were numerous additional opportunities for Satmex competitors to obtain frequency bands associated with foreign satellites, and the CFC emphasised the desirability of opening the satellite services market by employing foreign satellites. SatMex has subsequently complained that market competition is impaired because the price it paid for the Mexican satellite system exceeds the price at which its rivals can purchase access to foreign satellite services. The Ministry for Communications and Transportation (SCT) and the CFC are presently examining this contention.

In 2001, Radio Móvil Dipsa (Telcel), the wireless telephony affiliate of Telmex, sought authority from SCT to broaden its existing concession to operate a telecommunications network. The application requested permission to offer long distance cellular service as well as the previously authorised local cellular service. Under the applicable regulations, a favourable opinion from the Federal Telecommunications Commission (COFETEL) was a necessary condition for SCT approval of the application. COFETEL, in turn, sought an opinion from the CFC, although the CFC's participation was not required. The CFC, noting its previous determination that Telmex held a dominant position in the market for long distance services, concluded that permitting affiliate Telcel to expand into that market could only worsen the situation. Further, COFETEL has authority to regulate long distance service rates and the CFC observed that granting Telcel's application might enable Telmex to evade rate regulation by offering its customers long distance services through Telcel. COFETEL decided to recommend approval of Telcel's application, but imposed conditions apparently designed (albeit with doubtful efficacy) to address the

CFC's concerns. Thus, the permit provides that (1) during the first two years, Telcel may provide long distance services only to customers for whom it also provides local service, (2) the tariffs for Telcel's long distance services must be approved by COFETEL, and (3) Telcel is expressly prohibited from undertaking any anticompetitive practices.

In 2002, the CFC reviewed bid applicants for the award of a contract to supply electric power generation capacity in the state of Tamaulipas. The contract was offered under Mexico's Independent Power Producer (IPP) program. Electric power in Mexico is a "strategic area" reserved to the federal government under Article 28 of the Constitution, and two state-owned firms are responsible for providing electricity to the public. The largest, the Federal Electricity Commission (CFE) is responsible for all of the national territory except for the Federal District and certain adjoining areas, which are served by the second company, Luz y Fuerza del Centro (LFC). Private investment is allowed in electrical generation capacity only for self-supply, small-scale production, cogeneration, and the IPP program. Participants in the first three schemes are required to sell all excess production to the CFE, while IPP participants sell all the power they produce to the CFE under a long term contract. The IPP program is considered lawful under Article 28 because the private generators are not deemed to be engaging in the provision of electricity as "public service" utilities. In the Tamaulipas proceeding, the CFC defined the market as the generation and sale of electricity in the northeast area of the national electric system, and evaluated the prospective bidders to assess whether any of them would possess substantial market power in the event that the electricity market was subsequently opened to competition. Finding no such prospect, and observing that the price for sale of electricity to CFE is controlled by tariff, the Commission determined to pose no objections.

3.5 Market power determinations: rules that trigger price regulation to remedy market power

Most of Mexico's sector regulatory schemes authorise the regulator to impose price regulation, access controls, and other requirements on sector participants if the CFC finds an absence of effective competition in the relevant market (or, in telecommunications, the existence an economic agent possessing substantial market power). The Commission may also make a subsequent determination that, due to market changes, effective competition has been restored, so that regulatory controls must be terminated. When various airports and associated service facilities were privatised during the period from 1998 to 2000, the CFC concluded that effective competition did not exist and that price regulation was therefore appropriate both for the operation of the airports themselves and for the provision of all ancillary

airport services. In Mexico City, the airport is still operated by the government, but ancillary services to that facility are provided by private companies and are not subject to price regulation absent a CFC determination. In 2000, the CFC concluded that effective competition did not exist at Mexico City in the provision of internal passenger transportation services (such as telescoping passageways and mobile lounges). With respect to the airline transportation sector, the 1998 Report noted (p. 183) that the CFC was investigating whether airline fare levels showed the exercise of market power in some city-pair markets. The CFC ultimately concluded in October 1998 that effective competition did not exist in 26 city-pair markets. As to seaports, the CFC considered that competitive conditions did not exist in that sector and so concurred with the 1993 privatisation law vesting the Ministry of Communications and Transportation with industry-wide tariff authority. In 1998, three years after the ports were sold, the port operating company in Veracruz requested the CFC to determine whether effective competition had developed in that market, but the Commission found that it had not.

In 2001, the Commission examined competitive conditions in LP gas distribution. Mexico is the world's largest consumer of LP gas for domestic use, and the private distribution companies that obtained authority in the mid-1990s to deliver LP gas from Pemex pipeline terminals initially negotiated agreements with the government to establish the prices charged to consumers. Those agreements terminated in 2000, and prices immediately increased in an apparently coordinated manner. The CFC commenced two investigations, one to determine whether distributors were engaged in horizontal collusion and the other to determine whether effective competition existed. In late 2001, the Commission found collusion in 19 states and a lack of effective competition in 20 of 35 relevant markets. The latter determination would have authorised the Ministry of Energy to impose price regulation in those 20 markets, but the Federal Executive had already determined to regulate prices nationwide under LFCE Article 7 and the "necessary services" provision in Article 28 of the Constitution. In the collusion case, the LP distributors settled by agreeing to participate in a competition policy training program and to cooperate with an economic study of the LP distribution market.

Also in 2001, the CFC reaffirmed its determination, originally reached in early 1998, that Telmex possesses substantial market power in five telephony markets: local service, national long distance, international long distance, access to local networks, and "interurban transport services" for calls originating from other operators. Telmex had sought judicial review of the Commission's original determination, resulting in the suspension of the CFC's finding to await regulatory action by COFETEL. The regulations

issued by COFETEL in 2000 were likewise suspended as a result of court proceedings initiated by Telmex. The CFC subsequently withdrew its 1998 resolution, conducted a new market power determination proceeding to correct the deficiencies found by the reviewing court, and issued a new resolution. Telmex, as expected, has challenged the CFC's new resolution in court. COFETEL has not yet reinstated its proceedings or issued new regulations.

The 1998 Report expressed some dissatisfaction with the division of authority in regulated sectors, concluding that the CFC should have a stronger role to play once its determination of ineffective competition had been made. The Report suggested that one option would be to require CFC approval of the sector regulations issued in the wake of the CFC's finding. A second suggested option was for the CFC to accompany its market power determination with performance-based standards for inclusion in the regulations. A final suggestion was that the CFC should have authority to intervene in proceedings applying and enforcing the regulations, so that the CFC could promote effective responses from the sector regulator.³⁰ No proposals for legislative action to implement these ideas have been developed by the CFC or considered by Congress.

Over the past five years, the CFC has a mixed record of participation in proceedings to establish price regulation for inadequately competitive market sectors. In the airlines transportation sector, although the CFC's 1998 finding of ineffective competition in 26 city-pair markets was communicated to the Ministry of Communications and Transportation, the Ministry never acted on that finding. No rate regulation has been imposed in the airlines sector during the past five years. With respect to airports, the CFC was not involved in the development of price control regulations, either for the operation of the airports themselves or for the provision of ancillary airport services. The same is true for the development of price control regulations for seaport operations and LP gas distribution. On the other hand, the Commission cooperated closely, at COFETEL's invitation, in the development of the regulations issued in 2000 for controlling the five telephony markets in which the CFC had found Telmex to possess substantial market power.

3.6 State trade barriers: rules to prevent the impairment of interstate trade

As noted before, LFCE Article 14 authorises the CFC to determine whether a market restriction imposed by a Mexican state constitutes an interstate trade barrier, and thus is void. The Commission has resolved 11 cases of this kind during the past five years, issuing recommendations in 7 cases and making 4 public declarations that an interstate trade barrier

existed. Often, the interstate trade restrictions that the CFC encounters are sanitary requirements imposed by states on the importation from adjoining states of perishable foodstuffs, such as meat, poultry, milk, and eggs. Arguments asserting that such local restrictions are not anticompetitive barriers, but rather reasonable public health requirements, are generally rejected because the restrictions effectively obstruct interstate commerce rather than fairly implement federal sanitation rules. A 1999 CFC case involving amendments to the Federal District's local transportation ordinance examined a provision that barred foreign ownership in companies providing freight transport services in the Federal District. The CFC determined that this restriction was an improper restraint on the interstate flow of investment capital, noting also that an applicable federal statute permitted foreign owners to hold up to a 49 per share in Mexican freight transport companies.

3.7 Consumer protection: consistency with competition law and policy

In the Mexican legal system, the competition and consumer protection laws are enforced separately by two different agencies. The Federal Consumer Protection Law is enforced by the Federal Prosecutor for Consumers (PROFECO). This office is located in the Ministry of Economy, the same ministry to which the CFC is assigned for administrative purposes. The stated objectives of the consumer law are to promote and protect consumer rights and to procure equity and legal security in relationships between suppliers and consumers. PROFECO also enforces price controls established under the "necessary articles" provision in Article 28 of the Constitution, as well as the rules respecting weights and measures. The CFC considers that there are relatively few overlaps between the conception of consumer policy administered by PROFECO and the issues that arise under competition policy, and consequently there has not been a great deal of communication between the two agencies. The 1998 Report suggested that the CFC develop closer relations with PROFECO as a vehicle for communicating the benefits of competition to the consuming public. The Report also recommended that the CFC consider, as another means for winning recognition among consumers, pursuing deceptive advertising cases that entail anti-competitive effects.³¹ The relationship between the CFC and PROFECO has not changed materially since 1998. The Commission reports that it has examined several deceptive advertising cases under the LFCE but has not encountered any involving the requisite exercise of market power. The CFC also observes that it has asked PROFECO for assistance in investigating several monopolistic practices cases and expresses hope that such cooperation will increase in the future.

4. Institutional tools: implementation of competition policy

4.1 Competition policy institutions: the Federal Competition Commission

The CFC, which has sole responsibility for applying the LFCE, is established as an independent agency. LFCE Article 23 provides that it “shall be technically and operatively autonomous.” The Commission is attached to the Economics Ministry for purposes of budgetary administration. This means that the CFC negotiates its budget requests with that Ministry, and the Ministry thereafter transmits the request to the Finance Ministry for presentation to Congress as part of the budget package for the executive branch. Any fines collected in connection with CFC proceedings are remitted to a general treasury fund and not to the CFC. Further, the executive branch may make adjustments to approved budgets during the course of a fiscal year if financial conditions require, and such changes can affect the CFC. The legislation pending before Congress to require Senate approval of Presidential appointments to the Commission also has a budgetary provision. If the legislation is enacted, the CFC would be converted from a “deconcentrated” agency to a “decentralised” agency. The CFC would then present its budget requests directly to the Economics Ministry, and any fines collected would be credited to the agency’s account.

The CFC’s decisional independence is protected in part by the duration of the Commissioners’ tenure. The Commission’s Chairman and four commissioners are appointed for staggered ten year terms by the President of Mexico, and are removable only for cause. The Commissioners are thus insulated from the usual practice of virtually complete personnel turnover after presidential elections every six years. Further, in contrast to some sectoral agencies, the basis for the CFC’s autonomy is established by statute, not by ministerial regulation; and the Commissioners are appointed by the president, not by ministers.

The Chairman and four commissioners constitute the Plenum, in which the LFCE vests the CFC’s decision-making authority. The Plenum makes determinations by majority vote. If a tie vote arises because of a vacant seat, the Chairman has authority to break the tie by casting an additional vote. The Chairman presides at the Plenum’s meetings, directs the CFC’s work, represents the CFC publicly, and can appoint and remove personnel. The Executive Secretary, appointed by the Chairman, is responsible for operational and administrative co-ordination. The CFC’s work is accomplished by six operative directorates (legal affairs, economic studies, mergers, investigations, privatisation & bidding, and regional coordination),

assisted by five supporting directorates (international, economic norms, control & follow-up, administration, and information media).

The CFC's offices are located in Mexico City. It presently has no regional offices. The Commission has an agreement with the Economics Ministry by which agents in Ministry offices throughout Mexico are authorised to receive complaints, requests, and notifications relating to the LFCE and otherwise to serve as points of contact in the regions. The CFC has also signed cooperation agreements with most state governments.

4.2 Competition law enforcement by the CFC

Under LFCE Article 30, law enforcement or other proceedings before the CFC begin either in response to a complaint or "ex officio" at the Commission's own initiative. Complaints about absolute monopolistic practices may be filed by any person, while complaints about relative monopolistic practices and completed mergers are accepted only from an affected party.³² If the complaint meets the conditions for standing and content set out in the statute and Regulations, the CFC must deal with the case; it does not have the discretion to reject a complaint without reaching some decision. Authority to reject legally deficient complaints has been delegated to the Chairman and Executive Secretary, acting jointly (and subject to review by the Plenum). Acceptance of a complaint qualifies the complainant as a participant in the ensuing Commission proceeding. Regulation 26, section IV provides, however, that a complaint about a pending merger will be rejected if a notification respecting the transaction has been filed with the Commission. The regulation states that the Commission will take the complainant's assertions into account in analysing the merger, but will not accord the complainant status as a participant.³³

The overall course of Commission proceedings is subject to a series of deadlines and time limits, set either by the statute or the Regulations. The scheme contemplates that, in regular law enforcement matters, the CFC will reach a final decision within about 90 to 150 days after receiving a complaint. Merger matters are subject to different deadlines, discussed previously. If a party petitions for reconsideration (which it may do within 30 days after a CFC decision), the CFC will act on that petition within 60 days.

Once an investigation is commenced, the Commission publishes in the *Diario Oficial* (the federal government's official daily register), a notice announcing, in general terms, the unlawful practices at issue and identifying the market involved, but not naming the specific corporate target. The announcement serves to solicit relevant information from interested persons. During the investigation, the Commission may require the production of

documents, issue written interrogatories, and take oral declarations from “all persons who have any relation to the facts” under inquiry. In complaint cases, the Commission routinely serves a discovery request on the target firm, but does not disclose at that time either the identity of the complainant or the evidence that the complainant has submitted. LFCE Article 34, section II authorises the Commission to assess a fine of up to 1500 MDW (\$6200 USD) for failure to respond to discovery requests, and LFCE 35, section III provides authority for imposing a fine of up to 7500 MDW (\$31,000) USD) for submitting false declarations or information. The statute requires the Commission to hold “strictly confidential” any information filed with or obtained by the agency during its proceedings.

At the conclusion of the investigation, the Commission makes a determination whether “sufficient elements exist to bear out the existence of monopoly practices or prohibited concentrations.”³⁴ If not, the Commission closes the proceeding and so notifies the complainant. If so, the target is served with a writ of alleged responsibility (or OPR, for “oficio de presunta responsabilidad”), which includes a statement of the violation alleged and the facts cited in support. The identity of the complainant is disclosed to the respondent at that time. The respondent then has thirty days to file an answer and make an evidentiary proffer. Both the complainant and the respondent may request the Commission to undertake further discovery on their behalf using its discovery authority. After the Commission rules on the respondent’s evidentiary proffer and all discovery requests, a hearing is held, if needed, to take testimony from witnesses. The General Director of Legal Affairs presides at the hearing and both the complainant and respondent may attend. The Commission may order a further round of evidentiary proceedings if necessary for full elucidation of the issues in controversy. The Commission then calls for the submission of briefs and, upon their receipt, closes the record.

Commission Regulation 35 contemplates that expert witness may testify in CFC proceedings, but the Commission takes the position that evidentiary proffers of expert testimony must be limited to technical issues, such as the details of a manufacturing process relevant to making cost determinations in a predatory pricing case. The Commission refuses to accept expert testimony by economists on the grounds that the Commission is itself an economic expert, and should no more accept testimony from an economist than a court would accept testimony from a legal expert. Participants are free, however, to submit written analyses from economists for consideration by the CFC, although the agency is not obliged to address such submissions in the formal manner that would be required for testimony. The CFC’s position on economic expert testimony has been attacked in court, but the Commission has prevailed by relying on a judicial precedent in which a

trademark tribunal was permitted to refuse testimony from an expert on trademark theory.

Under Regulation 41, the respondent may, at any time during the proceeding but before the Commission renders its resolution, present a written offer to settle the case by terminating the unlawful practices at issue and undertaking any appropriate preventive. The Commission may accept the offer and close the case, but the regulation specifies that any settlement will not prejudice the Commission's authority to impose a fine or impair the complainant's ability to seek damages.

One Commission practice that is not explicitly reflected in the LFCE or the Regulations is the use of preliminary injunctions. Commission Regulation 1 states that, in Commission proceedings, Mexico's Federal Code of Civil Procedure shall apply to any matter not otherwise addressed. The Code of Civil Procedure includes provisions for temporary injunctions, and the CFC has invoked those provisions on a few occasions by accompanying an OPR with an order requiring the respondent to terminate the challenged monopolistic practice during the pendency of the Commission's proceeding. Most dramatically, the Commission took this approach in the Coke exclusive distribution case. As might be expected, the use of this tool is quite controversial, and parties subject to such injunctions have sought judicial relief. The Supreme Court has established as binding jurisprudence that a reviewing court may not suspend a CFC preliminary injunction during the course of a judicial proceeding brought to challenge it. The underlying question of whether the Commission may invoke the Federal Civil Procedures Code to issue an injunction in the first place, however, remains unresolved. The appellate courts have split on the issue and the matter is now pending before the Supreme Court. The CFC is developing an amendment to the LFCE designed to vest the agency with express injunctive authority. The Commission expects to propose the amendment regardless of which way the Supreme Court rules, because it prefers that all available enforcement tools be specified in the LFCE itself.

After the record closes in a proceeding, the Commission must, within the sixty day period provided by the statute, issue its resolution and order disposing of the case.³⁵ Any of the participants may then petition for Commission reconsideration. LFCE 39 provides that filing a petition automatically stays enforcement of the Commission's order until the petition is resolved. The Commission closed 452 petitions for reconsideration in the past five years, 40 in 1998, 41 in 1999, 49 in 2000, 75 in 2001, and then jumping to 247 in 2002. Of the 247 cases last year, 116 were filed by distributors in the LP gas "no effective competition" case and 47 by bottlers in the Coke exclusive distribution case. Subtracting those matters yields a total of 84 reconsideration cases in 2002. The Commission confirms its

decision about 55 per cent of the time, adopts modifications in a tenth of the cases, and revokes its determination in another tenth. The remaining 25 percent represent petitions that are withdrawn, dismissed for procedural deficiencies, or considered as not filed. Virtually all of the cases in which the Commission revokes or revises its decision involve the introduction of new evidence by the petitioner.

The following table shows the dispositions of Commission cases relating to monopolistic practices and other restraints on competition that were “concluded” from 1993 through 2002 (that is, cases for which all legal proceedings before the Commission have been completed). During the past five years, the Commission has resolved 219 complaints and 67 ex officio investigations. Of those complaints, 45 (20.5 per cent) resulted in sanctions or recommendations, and an additional nine (4.1 per cent) were settled under Regulation 41. If attention is focused solely on the 54 complaint cases that involved either a Commission finding that the LFCE had been violated or in a settlement under Regulation 41, the portion settled rises to 16.7 per cent. Of the 67 ex officio matters, 25 (37.3 per cent) resulted in sanctions or recommendations, and seven (10.4 per cent) were settled. Focusing on the 32 ex officio cases that involved either a Commission finding that the LFCE had been violated or a settlement, the portion settled rises to 21.9 per cent.

**TABLE 1: Monopolistic Practices and Other Restrictions on Competition
Commission Case Outcomes: 1993-2002**

	July-June			1996 July- Dec	1997	1998	1999	2000	2001	2002	Total
	93-94	94-95	95-96								
Total of cases concluded	30	16	27	17	52	50	41	63	64	68	428
Complaints	19	6	14	8	25	33	26	55	46	59	291
Sanctions or recommendations	4	1	5	--	2	9	3	7	6	20	57
Complaint rejected	1	1	1	3	1	10	12	33	--	--	62
Settled under Regulation 41	--	--	--	--	--	1	1	2	2	3	9
Closed	--	--	2	2	5	2	--	1	17	17	46
Others ^a	14	4	6	3	17	11	10	12	21	19	117
Ex-officio investigations	11	10	13	9	27	17	15	8	18	9	137
Sanctions or recommendations	6	6	10	2	13	5	6	4	7	3	62
Settled under Regulation 41	--	--	--	--	--	--	1	--	3	3	7
Closed	5	4	3	7	14	12	8	4	8	3	68

^a Includes cases withdrawn, dismissed and considered as not filed.

To publicise its resolutions, the CFC issues a press release, publishes a short summary of the decision in the *Diario Oficial*, and posts a longer summary on its website. The full text of the resolution appears in the following edition of the Commission's quarterly gazette, which is also posted on the website.

Practitioners before the Commission raise several concerns about Commission practices and procedures (in addition to expressing some chagrin about the expert testimony issue described above). These concerns warrant attention although not universally held, and may be classified into the following categories: (1) transparency and consistency of agency decisions, (2) appearance of bias, and (3) confidentiality. The central concern respecting concerning transparency and consistency is that the Commission retains too much discretionary freedom because it fails to disclose enough of its reasoning processes in resolving cases. Participants in CFC cases who believe that the Commission's resolutions are insufficiently detailed can (and do) seek judicial review, so there is a legal constraint on the Commission's ability to retain undue discretion. Some practitioners nonetheless express discontent with the burden of seeking judicial review, and argue that, regardless of judicial review standards, the agency should describe its analysis more fully and explain how the rationale employed relates to that of similar previous cases. The newly effective Transparency Law does not itself resolve this controversy. The CFC already releases the full text of its initial resolutions and resolutions issued on reconsideration. Minor redactions of confidential information are sometimes made, but those redactions do not materially affect exposition of the Commission's analysis.³⁶ The new law expands the Commission's disclosure obligations to cover the votes cast by Commissioners in individual matters, and any separate or dissenting statement that a commissioner may submit to the Plenum.³⁷ The law does not, however, require the CFC to issue longer opinions.

The 1998 Report noted that the CFC's June 1998 statement on concentration indices was issued, in part, as a response to business community concerns that the agency's standards for analysing mergers "were not transparent or comprehensible."³⁸ Although practitioners consider the 1998 statement to have been a step in the right direction, the Commission has issued no other substantive criteria, guidelines, or formal guidance since that time. As previously noted, however, on June 26, 2003, the Commission announced that it expected to issue merger guidelines by June 2004 and was preparing draft provisions to be published for public comment. This development promises to address private sector concerns about the CFC's merger enforcement policies. The guidelines may also have

the effect of promoting transparency with respect to market definition and market power issues in non-merger cases.

Concerns about bias spring from perceptions held by some practitioners about the Commission's approach to investigations, particularly investigations arising from a complaint filed by an outside party. The target of a CFC investigation first learns of the Commission's inquiry when it receives a discovery request from the agency. The document, although not couched as a demand, may appear to the target as a fishing expedition because the specific allegation under investigation is not described, nor is there any disclosure of the complainant's identity or of the evidence that the complainant has submitted. In some quarters, there is a view that the Commission should not investigate a complaint to determine whether there is a sufficient basis to believe that an unlawful practice exists, but should simply issue an OPR whenever it receives a complaint valid on its face.³⁹ In any event, once the OPR is issued and the Commission assumes an adjudicative role, there are no restrictions on contacts between the Commissioners and the participants, or between the Commissioners and the CFC's prosecuting staff. Nor is there any requirement that the substance of such discussions be entered in the record of the case. The fact that individual Commissioners discuss pending cases with the staff and the participants in separate meetings can likewise fuel doubts that targets may have about the Plenum's impartiality. The net effect of these practices is that the Commission is sometimes viewed as having converted itself into a stalking horse for the complainant

The CFC notes that the Supreme Court has upheld the constitutionality of the Commission's investigative process. The Commission also observes that the practice of unrestricted communications between and among the Commissioners, the agency staff, and the participants in a pending case is standard in Mexican legal practice, and occurs during proceedings before all adjudicative bodies, including the Supreme Court. Further, although a participant in a CFC case who has evidence that a Commission agent is biased may file an administrative complaint alleging bias, no such complaint has ever been initiated in a CFC proceeding.

With respect to confidentiality, there is no complaint that the Commission is inadequately protective of the sensitive commercial data that it receives. Rather, the concern is that there are no Commission Regulations addressed to confidentiality issues. This deficiency is believed to have undesirable results when Commission actions are subjected to judicial review. Reviewing courts are inclined to order broad disclosure of Commission case files, with the result that commercial data may fall into the hands of a party's competitors.

Participants (including complainants) involved in Commission cases have abundant opportunities to seek judicial relief if they are dissatisfied with the Commission's actions. Two forms of proceeding are potentially available: an "amparo" action in a federal district court and an appellate action in the Court of Fiscal and Administrative Justice ("Fiscal" or "Tax" Court). The amparo is a proceeding established in Articles 103 and 107 of the Mexican Constitution to provide all persons with protection against unconstitutional acts by the government. An amparo is available to any party who can raise a claim that he is being subjected to an unconstitutional statute or that his due process rights are being infringed. Due process, in this context, has a broad sweep and is not limited to "procedural" issues. Participants can, and do, attack the merits of agency decisions in an amparo because 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.⁴⁰ In CFC actions, amparos have been filed to attack (1) information demands issued at all phases of preliminary investigations and formal proceedings, (2) issuance of the OPR, (3) decisions to admit or reject evidentiary submissions, (4) preliminary injunctions and other interlocutory orders, (4) fines imposed for failure to comply with discovery orders, and (5) final agency determinations and orders.⁴¹ Some amparo actions allege that the LFCE is unconstitutional on its face, while others allege that the statute has been applied unconstitutionally in the particular case, and still others allege error in the CFC's final decision.

The volume of amparo actions has increased significantly over the years. In 1997, 15 cases were filed. The annual numbers since then are 33 in 1998, 63 in 1999, 83 in 2000, 124 in 2001, and 117 in 2002. This yields a total of 420 cases from 1998 to 2002 (compared to 122 through the end of 1997). Of the 420 cases, 239 (57 per cent) were filed during the pendency of Commission proceedings, while the other 181 (43 per cent) were filed as challenges to final Commission determinations. The procedural interface between amparo cases and the underlying Commission proceeding can become exceedingly complex. Respondents may file a sequence of amparos as the CFC case progresses, and Commission cases involving several respondents can result in multiple amparos filed in different district courts.⁴² When interlocutory procedural amparos are decided in the respondent's favour, the Commission ordinarily commences a new proceeding, which is itself subject to new amparo challenges. And district court determinations in amparo cases can be appealed by either side to a higher court. If the district court has issued a ruling on the constitutionality of the LFCE, the appeal of

that determination lies directly to the Supreme Court. Appeals on other issues are resolved by three-judge appellate tribunals, from which no further appeal is ordinarily permitted. The Supreme Court, however, besides resolving claims of statutory constitutionality, also considers matters involving conflicts between appellate court decisions. Thus, procedural issues under the LFCE that divide the appellate tribunals may eventually receive the Supreme Court's attention.

The amparo process, of course, delays resolution of Commission proceedings. Further, when Commission orders are at issue, respondents routinely request, and the district courts ordinarily grant, motions to stay the CFC's order during the court's review.⁴³ While the Commission has been almost completely successful in amparos that have reached the Supreme Court, district courts have ruled against the CFC on numerous occasions, typically on points of procedure. There is perhaps a particular bias toward such adverse decisions whenever an amparo case involves both procedural issues and a challenge to the merits of a final CFC decision. The district courts are unfamiliar with, and probably uncomfortable about, substantive antitrust issues. Further, Mexico employs a civil law system that 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.

In a few Commission amparo cases, parties challenging the Commission's action have proffered testimony by economic experts. The district courts have no rule barring economic experts, but the applicable rules of procedure in amparo cases require that the court retain its own expert if the court determines to admit testimony by a party's expert. This poses yet another problem, because the judiciary's budget for services of this kind is limited, and the pool of capable antitrust economists is quite small. Thus, the expert ultimately retained by the judge may not have expertise suitable for a CFC case. Nonetheless, the procedural rules require that the judge, in deciding the merits of the case, must rely on the expert retained by the court in preference to the expert retained by a party.

The problems presented by the amparo process are difficult to resolve. The passage of time may ultimately produce a decrease in case volume as issues reach the Supreme Court for resolution. In the meantime, the right to judicial review can be constrained only by amending the constitution, and altering the constitutional scheme of checks and balances is rightly disfavoured. There has sometimes been mention of establishing a specialised amparo court with economic expertise to hear cases from the CFC and the other agencies that deal with economic issues, but no action to advance such a proposal has been undertaken.

The second form of judicial review available to aggrieved parties is an action in the Federal Court of Fiscal & Administrative Justice. The prime function of this court is to consider tax cases, but it asserts jurisdiction to review any agency action that involves the imposition of a monetary payment obligation on a private party. Thus, any Commission interlocutory order or final resolution that imposes a fine is exposed to attack before this court. Moreover, if a CFC final resolution is at issue, the private party can request Fiscal Court review of the injunctive portion of the resolution as well. The CFC has argued, sometimes successfully, that the Fiscal Court has jurisdiction only to review regular tax assessments and thus has no authority at all in CFC cases. The CFC also takes the position that, even if the Fiscal Court can lawfully examine CFC monetary assessments, no other part of the Commission's order is subject to review. The appellate courts are split on whether the Commission is correct on all counts or whether the Fiscal Court has jurisdiction to review some or all of a CFC order. The Supreme Court has not yet spoken on these issues.

A private party who is dissatisfied with a Fiscal Court decision may file an amparo to challenge it before a three-judge appellate tribunal. Subsequent review of tribunal decisions before the Supreme Court is available only for rulings on statutory constitutionality or on issues involving conflicts between appellate court decisions. The CFC, although it can appeal adverse amparo decisions, cannot commence an amparo in the first instance. Thus, if the CFC is dissatisfied with a Fiscal Court decision, its only recourse is through an appellate review process established by statute. The statute, however, extends appellate jurisdiction only in cases where the monetary amount in controversy exceeds a minimum limit, and the fines imposed in CFC cases typically do not meet the threshold.

Like amparo actions, the volume of Fiscal Court actions has increased over the years, but in a considerably lower range. Only three cases were filed from 1993 through 1997. The annual numbers since then are six in 1998, 9 in 1999, 14 in 2000, 13 in 2001, and 43 in 2002. This yields a total of 85 cases in the past five years. The spike in cases that occurred in 2002 arose from two Commission proceedings that entailed fines against multiple parties for failure to comply with discovery orders. Twenty of the cases related to the Coke exclusive distribution proceeding and the other eight to an investigation of monopolistic practices in the cellular telephony market. The Commission has lost a number of cases before the Fiscal Court on the grounds that its orders imposing fines were not adequately justified.

CFC orders that impose fines are not self-executing, even if they survive all amparo and Fiscal Court review proceedings. Once a fine has become final and payable, it must still be collected, a duty that falls to the fiscal department of the municipality in which the fined party resides. If payment

is not made voluntarily, the municipal treasurer must commence an administrative proceeding to issue an order of execution against the debtor's assets, and this proceeding is itself subject to amparo review. The result of these judicial and procedural intricacies is that only a small portion of the fines ordered by the Commission has been collected. Through 2002, the Commission imposed 493 fines amounting to 329 million pesos (about \$31.2 million USD). Of that amount, it has collected 9.5 per cent (slightly less than \$3 million USD) and revoked or lost on judicial review another 18.5 percent, leaving uncollected the remaining 72 per cent (\$22.5 million USD).

4.3 Other enforcement methods and techniques

The CFC controls application of the LFCE. There is no other source of substantive law about competition policy issues, either at the state or federal level. Under Article 38 of the LFCE, private parties that are proven in a Commission proceeding to have suffered injury from an unlawful monopolistic practice or merger may sue the responsible parties in court to recover damages. The court in such a proceeding may take account of the CFC's estimate of the plaintiff's damages. Commission Regulation 48 provides that, subsequent to entry of the Commission's final resolution, an injured party may petition the CFC for an ancillary proceeding to estimate damages. To the end of 2002, no petitions have been filed under regulation 48, and no private damage actions have been commenced in court under LFCE 38.

The 1998 Report suggested that, given the CFC's resource constraints, private parties should have an independent right to pursue antitrust violations in court. The Report noted that federal (rather than state) courts would be the preferred forum for such cases, but noted that the jurisdiction of federal courts in Mexico does not now extend to commercial disputes between private parties.⁴⁴ The CFC has not proposed legislation on this point and the Commission's experience in federal district courts thus far does not augur well for expecting sophisticated treatment of antitrust issues by federal judges. The absence of any action by private parties under LFCE Article 38 suggests that further maturation of Mexico's antitrust environment, especially in the courts, is necessary before private actions can become a significant feature of competition policy enforcement.

An enforcement technique that can be useful, or even essential, to the CFC in cases involving international firms or transactions is to seek assistance from, or otherwise cooperate with, antitrust agencies in other countries. The 1998 Report noted that, although the CFC adhered to the general cooperation principles established in NAFTA and other existing trade agreements, and complied with the cooperation principles promoted by

international organisations such as the OECD, it had no formal co-operation agreements with any other antitrust agencies.⁴⁵ The Report recommended that the CFC enter such agreements to improve its capacity to deal with enforcement matters having international dimensions.⁴⁶ The Commission has been very active on this front in recent years. It has signed antitrust cooperation agreements with the United States (effective July 2000), the European Union (effective July 2000), and Canada (effective March 2003). During 2002, the CFC notified about 52 cases to the United States and about 23 to the EU, and undertook consultations with those authorities with respect to pending investigations in 26 matters. Two new free trade agreements with provisions relating to competition policy have been signed by Mexico since 1998: Israel (effective June 2000) and EFTA (Iceland, Liechtenstein, Norway, and Switzerland; effective July 2001). The Commission is currently negotiating antitrust cooperation agreements with competition authorities in Brazil and Chile and is also participating in the competition working groups related to Mexico's ongoing trade agreement negotiations with Japan, Argentina and Uruguay. Finally, the CFC is an active participant in a host of multinational groups and projects that address competition policy, including the ICN (International Competition Network), FTAA (Free Trade Agreement of the Americas), APEC (Asian-Pacific Economic Cooperation), UNCTAD (United Nations Council for Trade and Development), and the WTO (World Trade Organisation).

4.4 Agency output, priorities, resources, and management

The following table shows the Commission's output in terms of matters "concluded" from 1993 to 2002 (that is, cases for which all legal proceedings before the Commission have been completed). This Table, unlike Table 1, is not limited to law enforcement proceedings, and thus includes merger notification reviews, auctions, consultations, and other forms of activity by which the Commission exercises its statutory powers. As described elsewhere, the 784 concession matters listed for 2002 include 738 notices of applications for LP gas distribution permits. If those matters are subtracted, the number of matters concluded for 2002 changes to 661, and the number of all matters concluded from 1993 through 2002 comes to 4041. The distribution of cases among the categories is stable from year to year and shows a commendable dispersion of activity.

**TABLE 2: Matters concluded by the CFC
1993-2000**

	July-June			1996 July-Dec	1997	1998	1999	2000	2001	2002	Total
	93-94	94-95	95-96								
Total of cases concluded	148	176	250	192	499	514	469	529	603	1,399	4779
Mergers ^a	57	89	109	71	218	195	245	276	311	260	1831
Monopolistic practices and other restrictions on competition	30	16	27	17	52	51	41	63	64	68	429
Consultations	14	31	48	14	49	64	41	39	49	40	389
Privatisations, concessions, permits and declarations on market power and competition conditions	34	25	31	78	154	164	101	102	104	784	1577
Appeals for review ^b	13	15	35	12	26	40	41	49	75	247	553

a/ Since 1998, the data reflect a simplified merger notification procedure under LFCE Regulation 21.

b/ Reconsideration of initial Commission resolutions under LFCE article 39.

Detail about the Commission's law enforcement cases dealing with monopolistic practices and other restrictions on competition appears in the following table. This Table covers the same class of proceedings covered by Table 1. Table 1, however, focused on the outcomes of monopolistic practices, whereas this table shows the distribution of proceedings according to the type of unlawful conduct at issue. It should also be noted that Table 1 (and Table 2 as well) display data for cases as to which all legal proceedings before the Commission were completed in the specified year. The table below, in contrast, covers all proceedings in which the Commission rendered an initial resolution in the specified year, and therefore includes recent decisions for which petitions seeking Commission reconsideration under LFCE 39 may be filed or resolved in a subsequent year.

TABLE 3: Monopolistic Practices and Other Restrictions on Competition
Commission Cases by Type of Practice:1993-2002

Investigated practice	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	Total
Total of cases concluded	43	42	43	51	83	73	65	90	79	51	620
Complaints	19	21	18	10	26	58	45	65	64	43	369
Absolute monopolistic practices				2	1	4	1	3	9	1	21
Relative monopolistic practices	18	20	17	8	21	50	28	29	41	30	262
Absolute and relative monopolistic practices	1				3	2	2	6	1	2	17
Absolute monopolistic practices and unlawful merger									1		1
Unlawful merger					1	1	14	25	10	7	58
Non-notified concentrations		1	1							1	3

Table 3 (cont'd)

Investigated practice	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	Total
Ex officio investigations	24	21	25	41	57	15	20	25	15	8	251
Barriers to interstate commerce						1		2	2	2	7
Absolute monopolistic practices	1	2	1	7	4		6	7	2	3	33
Relative monopolistic practices	16	18	19	19	24	6	1	9	2	4	118
Absolute and relative monopolistic practices							1				1
Absolute monopolistic practices and unlawful merger							1				1
Unlawful mergers					1		1		7		9
Non-notified concentrations	7	1	4	12	21	9	7	7	4	1	73
Barriers to interstate commerce			1	3	7		3	2			16

One feature revealed by Table 3 is the allocation of Commission ex officio cases between absolute and relative monopoly cases. For the period 1993 through 1997, the Commission concluded 15 ex officio absolute cases versus 96 relative cases, yielding a ratio of 6.4 relative cases for each absolute case. For the period from 1998 to 2002, 18 ex officio absolute cases were concluded versus 22 relative cases, for a much lower ratio of 1.2 relative cases for each absolute case. As might be expected, the situation is quite different for proceedings initiated in response to complaints. There, the period from 1998 to 2002 saw 18 absolute cases versus 178 relative cases, for a ratio of nearly ten relative cases to one absolute case. A criticism sometimes heard is that the Commission initiates too many vertical cases and too few horizontal cases, but that assertion does not appear to be supported by the Commission's ex officio activities.⁴⁷ The pattern of complaints received is, of course, beyond the Commission's control.⁴⁸

With respect to the agency's financial resources, the CFC's budget increased from 52 million pesos in 1997 (\$6.8 million USD) to 152.6 million pesos in 2002 (\$15.8 million USD), an increase of 132 per cent in dollar terms. The agency share of Mexican government non-defence expenditures increased by approximately a fifth from 1998 to 2001 (from 0.0239 per cent to 0.0284 per cent), but declined somewhat (to 0.0255 per cent) in 2002. In terms of human resources, the Commission had 208 employees in 1997, up 26 per cent from the 165 people it employed in 1996 and previous years. Employment held steady at 208 for the years 1997 through 2000, then dropped slightly, to 198 in 2001 and then to 192 in 2002. CFC output, as measured by matters concluded, increased from 529 in 2000 to 661 in 2002 (net of the 738 LP gas applications). This implies an increase in staff productivity from 2.54 matters per employee in 2000 to 3.44 in 2002.

Among the five commissioners, there are three economists and two lawyers. The CFC as a whole has 39 economists, 41 lawyers, 10 accountants, and about 50 other professionals and technicians. The remainder are clerical and support staff. Approximately 30 professional staff members from the directorates of Investigations and Legal Affairs are occupied with the investigation and prosecution of monopolistic practice cases. Nine staffers from the Mergers directorate are devoted to merger review while an equal number from the Privatisation directorate focus on privatisation and auction proceedings. And approximately 14 personnel from across the Commission are involved in regulatory matters such as assessing proposals for new regulations, or evaluating changes in trade policy and other government programs and actions. The CFC's annual staff turnover rate averaged 14.5 per cent for the five years from 1998 to 2002. The CFC does not consider that, as an agency, it has serious difficulty

retaining qualified staff at the salary levels it can afford to offer, and believes that the turnover rate for its professional staff is considerably lower than that for the federal government at large. The General Director for Mergers, however, expressed some concern about the agency's ability to hire and retain economists with sufficiently high academic credentials to conduct effective merger case reviews.

The Legal Affairs Directorate has 17 lawyers who devote about 40 per cent of their time to monopolistic practice cases and petitions for Commission reconsideration, 40 per cent to amparo and Fiscal Court cases, and 20 per cent to requests for legal advice from the Commission's officers and staff. 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. At least at the Supreme Court level, however, the record of amparo case outcomes appears to show that the Commission is holding its own. On the other hand, handling the nearly 180 amparo actions that were pending during 2002 with only seven attorney work-years must surely have been a daunting challenge. Another office that is stretched thin is the General Directorate of Economic Studies, with a staff that is considerably smaller than it possessed in earlier years. The General Director for Investigations believes that interviews conducted in the field (as opposed to the examination of documents delivered to the Commission's offices) would be a fruitful and effective investigative technique, but such an approach is not possible with existing staff resources. These circumstances, and the fact that the Commission's overall workload has been increasing, suggest that the agency's staffing levels should be increasing, not decreasing, and that its budget needs appropriate supplementation. If the proposed legislation establishing the CFC as a decentralised agency with independent budget authority is enacted, the Commission will be in a better position to seek additional resources.

To enhance its internal management systems, the Commission in 2000 sought and obtained certification under ISO standard 9002 (1994) for its processes relating to pre-merger notification filings, case investigations, petitions for Commission reconsideration, requests for consultations, and evaluations of auction participants. The ISO standards establish quality assurance requirements relating to mission performance, covering such elements as timeliness, responsiveness to customers, transparency, and systematic self-evaluation. In March, 2003, the Commission received certification under ISO standard 9001 (2000), which required the extension of quality assurance mechanisms to all areas of Commission operation.

In 2001, the Commission retained an external auditor to evaluate the quality of agency functions that entail interaction with private parties. The auditor surveyed forty randomly-selected economic agents who had been

involved in some type of Commission proceeding. The results showed that 93 per cent of those surveyed considered CFC employees to be both highly professional and highly honest, 82 per cent thought that the CFC made independent decisions, and 78 per cent believed that the CFC could improve competition in Mexico. On the other hand, 62 per cent thought that the CFC could be politically influenced, and 22 per cent evaluated the CFC case resolution process as being unduly slow.

Although the CFC has not adopted explicit enforcement priorities, the Commission states that it pays particular attention to (1) allegations arising under LFCE Article 14 with respect to interstate trade barriers imposed by state governments, and (2) privatised sectors, especially those that involve regulatory regimes. The 1998 Report urged the Commission to maintain emphasis on regulated and privatising sectors, and undertake competition advocacy and law enforcement actions in those sectors to promote pro-competitive outcomes.⁴⁹ The Commission believes that it has satisfied that recommendation, citing its frequent involvement in the development of regulatory sector rules, its role in assessing auction and privatisation candidates, and such CFC law enforcement actions as the Pemex lubricants case, the proceeding against price fixing by LP gas distributors, and the numerous cases involving Telmex.

5. Competition Advocacy

Competition advocacy, for purposes of this discussion, covers all the activities of the CFC designed to promote the understanding and implementation of sound competition policy, but excluding Commission actions that have independent legal effect. Thus, treated here are the Commission's functions as a consultant to other government agencies, as an advisor to private parties seeking guidance, and as an advocate at large for public recognition and acceptance of competition principles.

The LFCE explicitly vests the CFC with authority to engage in certain forms of competition advocacy. The agency is empowered to address the competitive effects of proposed changes to federal programs and policies and, at the request of the Federal Executive, to comment on the competitive implications of new laws proposed by the executive branch to Congress.⁵⁰ The Commission also has discretionary authority under the LFCE to issue, on its own initiative, non-binding opinions addressing questions of competition policy with respect to laws, regulations, agreements, and other governmental acts.⁵¹ Regulation 49 provides for the issuance of similar non-binding opinions in response to a request from any private party or governmental agency.⁵² (The CFC refers to opinions of the latter two kinds as "consultations.") Traditionally, Commission opinions issued under these provisions were not routinely placed on the public record, because the CFC considered that the recipient was the proper party to control disclosure. Under the new Transparency Law, however, the Commission treats all such opinions as matters of public record.

Several Commission functions that have legal effect, and that therefore do not constitute competition advocacy as defined here, have an ancillary competition advocacy component. For example, the Commission's affirmative approval is required for prospective participants in most auctions conducted in regulated sectors, and therefore the CFC's decisions in assessing bidders have independent legal consequences. But the Commission also participates with sector regulators to design the auctions themselves and to formulate rules that apply to all bidders equally. Similarly, while the Commission has authority under LFCE 14 to declare that a state regulation constitutes an interstate barrier to commerce, it can also exercise its discretion to make recommendations to state and local governments respecting regulations affecting only intra-state commerce.⁵³ For example, as discussed in section 3.6 of this Report, the CFC in 1999 determined that an amendment to the Federal District's transportation ordinance constituted an interstate barrier to commerce in investment capital by limiting foreign ownership of local freight transport companies. In deciding the case, however, the CFC also noted that the amendment

replaced the previous permit system with a certificate of need requirement and established a rate regulation scheme. The Commission recommended that the former permit system be retained and that any rate regulation be conditioned on a finding of ineffective competition by the CFC. The Commission has made non-binding recommendations of this kind to state and local governments in about twenty cases over the past five years, in matters relating to the sale of pharmaceutical products, taxi service, beer, funeral services, and tortillas, among others.

The CFC has an active program to consult with sector regulators in projects to develop, review, or revise sector regulations. In 1998, the CFC assessed a proposed mechanism for long distance telephone rate registration designed to prevent predatory pricing. The Commission advised that such mechanisms could restrain competition if applied universally and so were appropriate only with respect to economic agents that possessed market power. From 1998 to 2000, the CFC was involved in developing the regulations for pay TV and audio services. It successfully urged that pay TV broadcasters be able to access, on equitable and non-discriminatory terms, free TV channel programming that the pay broadcasters wished to re-transmit. It also secured a rule modification to require that the transfer of spectrum concession rights, either by sale or as a consequence of abandonment, be subject to prior CFC approval. The Commission, however, did not succeed in removing infrastructure development deadlines that the regulations made applicable to concession holders. The Commission argued that such requirements could distort investment decisions best left to market forces. Other regulatory development projects in which the CFC was involved during the past five years related to civil aviation, parcel delivery services, electricity generation, and both natural and LP gas.

The CFC also participates in a number of inter-ministerial commissions to advocate competitive principles in the design and implementation of governmental policies and programs. These commissions include:

- the Inter-ministerial Privatisation Commission (CID), which establishes the framework for industry privatisation proceedings;
- the Inter-ministerial Public Expenditure and Financing Commission (CIGF), which deals with the administration of large public construction projects;
- the National Standards Advisory Commission, which manages a system of National Standards Advisory Committees. The Committees are responsible for developing product content standards, accreditation systems, and similar norms that, when

promulgated by the government, can have anti-competitive exclusionary effects;

- the Foreign Trade Commission (COCEX), which reviews proposals by the Economics Ministry to establish tariffs and impose trade law sanctions such as countervailing duties and anti-dumping penalties;
- The Federal Regulatory Reform Commission (COFEMER), which plays a critical role in reviewing all regulations proposed by federal government agencies.

The Privatisation Commission's organic statute provides that the CFC shall be a permanent guest, and the Commission has participated in all of the CID's privatisation planning activities since mid-1993. In 2000, for example, the CFC objected to a government plan to privatise Aseguradora Hidalgo (AHISA), an insurance company that held the exclusive right to sell policies to government employees through payroll deductions. The Commission concluded that the exclusivity provision was anti-competitive. The privatisation plan was thereafter revised by limiting the exclusivity provision to a two-year transitional period. The CFC raised no objection to the revised plan or to the participation by any of the four prospective bidders in the subsequent 2002 auction for AHISA. The Commission was also closely involved in the planning for privatising 34 federally-operated airports, which were aggregated into three regional groups for purposes of sale.

At the Inter-ministerial Public Expenditure and Financing Commission (CIGF), the Commission participated in a 2001 matter involving construction of a gas pipeline by Pemex. Authorisation was granted subject to the condition that Pemex divest control of the pipeline to a private company after a specified number of years. Recent CFC activities relating to the work of the National Standards Commission include opinions about technical standards for trackage and haulage rights in railroad transportation, edible oil content, and weight restrictions imposed on freight vehicles to reduce highway deterioration.

The antidumping and countervailing duty mechanisms adopted by Mexico under the GATT are administered by the Unfair Trade Practices Unit (UPCI) in the Economics Ministry. By law, UPCI must submit its proposed resolutions for review by the inter-ministerial Foreign Trade Commission (COCEX), of which the CFC is a statutory member. The authority of COCEX is limited to commenting on UPCI's proposals, although the final resolution issued by the latter agency is supposed to recite and respond to

any COCEX comments. The CFC's concern, of course, is that enforcement of fair trade laws against imports can distort competition in domestic markets. Antidumping duties imposed by the UPCI have sometimes protected national producers with a dominant position in the domestic market. In other cases, the duties simply delay an effective market clearing process by protecting inefficient local firms. The CFC does not consider that alleged dumping practices threaten healthy competition, except in the unlikely circumstance that the exporter has sufficient power to monopolise a market in Mexico.

The 1998 Report recommended that the Commission play a forceful role respecting trade law matters. The Report suggested that, if the LFCE is not amended to vest the CFC with authority to cure structural monopoly through divestiture, then the Commission should be given more power in the trade law process to prevent anti-competitive outcomes. At the least, the Report concluded, the CFC should exercise its advocacy function to assure that the competitive implications of trade issues are well publicised.⁵⁴ In the past five years, the Commission has diligently discharged its duties as a member of COCEX. As a single voice on a multi-member panel, however, the CFC cannot control outcomes. Moreover, arguments founded on competition principles that are inconsistent with the underlying objectives of the fair trade laws do not carry much weight with UPCI. As noted in section 2.3 of this Report, the CFC is developing a legislative proposal to address structural monopoly. There has been no action, however, with respect to enhancing the Commission's authority in the trade process, nor any special advocacy effort directed to trade law issues.

The Regulatory Reform Commission (COFEMER) is the present manifestation of the Economic Deregulation Unit (EDU), an office that previously existed as part of SECOFI, the predecessor of the present Economics Ministry. The EDU developed the draft legislation ultimately enacted in 1993 as the LFCE, and was responsible for promoting a wide range of deregulatory activities. In May 2000, the EDU was converted to an independent commission, although still located in the Economics Ministry. While denominated a commission, COFEMER is not headed by a plenum, but by a Director General appointed by the President of Mexico.

During its life, the Economic Deregulation Unit was assisted by an advisory group called the Economic Deregulation Council (CDE), a committee of government officials and private sector representatives that met periodically to discuss pending issues of deregulation policy. The present form of the CDE is the Regulatory Improvement Council, which serves as an advisory body to COFEMER. The 1998 Report recommended that the CFC be made a member of the Economic Deregulation Council to "ensure that competition policy issues are regularly considered at the highest

levels in regulatory reform efforts.”⁵⁵ That recommendation has been satisfied, at least technically, because the Chairman of the CFC is a permanent member of the present Regulatory Improvement Council. The significance of the advisory Council to COFEMER’s business, however, is not as prominent as it was with respect to the EDU. In 1998, there was no formal procedural mechanism through which the CFC could identify and comment upon proposed regulations. That situation changed dramatically in May 2000 with COFEMER’s establishment.

Federal agencies in Mexico are now required by statute to submit all of their proposed regulations to COFEMER, accompanied by a regulatory impact statement. COFEMER posts the regulations and the impact statement for comment by interested parties, and thereafter issues an assessment of the proposal to the originating agency. The agency then files a response to the assessment, and COFEMER issues a final opinion either approving the proposal or stating COFEMER’s remaining objections. All of the comments exchanged between the agency and COFEMER appear on the public record and are considered by the President’s Legal Counsel, who must approve the regulations before they are promulgated.

The striking feature of the interface between the CFC and COFEMER is that the CFC has apparently filed only one unsolicited public comment in a COFEMER regulatory review proceeding since May 2000. That matter involved a proposed change to the natural gas distribution rules under which entities engaged in operating self-supply gas pipelines would have been prevented from serving any customers but themselves. The CFC’s comment concluded that the proposal would have an anti-competitive effect by protecting incumbent gas distributors. On a few occasions, the CFC has also filed comments at the express invitation of COFEMER. Examples include regulations involving bi-directional data transmission by pay television broadcasters, social security administration, and export coffee marketing. COFEMER, however, does not routinely issue notices or invitations to the CFC or anyone else, because all pending actions are posted on COFEMER’s website and COFEMER assumes that an interested party will file a public comment on any matter it finds significant.

The CFC asserts that “CFC-COFEMER collaboration is not rare,” citing the Chairman’s participation in the Regulatory Improvement Council and the four comments that the Commission filed in COFEMER proceedings, described in the previous paragraph. The CFC notes also that it frequently participates with the originating agency in developing proposals that are later vetted by COFEMER, and that there is no need to participate at the COFEMER stage in such situations because the regulatory proposal already reflects the Commission’s input.

Another important form of competition advocacy undertaken by the Commission is in identifying and opposing anti-competitive features of proposed legislation. The Commission is routinely invited to participate in reviewing proposals that originate both in Congress and in the executive branch agencies, although there is no statutory requirement for such consultations. As described in section 1 of this Report, several anti-competitive attempts to amend the LFCE itself were successfully resisted by the Commission during the last five years. With respect to proposals involving subjects other than the LFCE, the Commission has engaged a variety of topics since 1997. In 1999, the CFC advised that legislation to privatise electricity generation should include provisions assuring non-discriminatory access to transmission networks at regulated prices, allocating concessions through public auctions in which applicants would be vetted by the CFC, and requiring cost-based pricing of services to residential, commercial, and industrial customers to avoid distorting cross-subsidisation. Other legislation that has drawn the CFC's attention include proposals affecting ocean shipping (restraining entry through high warranty bond requirements and restrictions on foreign vessels), truck transportation (tariff regulation and constraints on vertical integration of inter-modal carriers), and broadcasting (flawed mechanisms for allocating new concessions, including eligibility limits based on existing market shares measured by audience ratings).

Besides participating in legislative processes, the Commission has recently organised conferences to examine pending issues in regulated sectors. The conferences, funded through an APEC Program to Promote Economic Competition in Regulated Sectors, are two-day events targeted to regulators, government officials, legislators, and academics. Two conferences, dealing with electricity and transportation, have been held thus far. In May 2002, at a conference sponsored jointly by the CFC and the Energy Regulatory Commission, 150 attendees considered possible alternatives for the efficient development of the Mexican electricity sector. At a September 2002 conference sponsored jointly by the CFC and the Ministry of Communications and Transportation, 200 attendees addressed the requirements for effectively-functioning markets in aviation, railways, shipping and ports, and multi-modal transportation. Two more conferences, dealing with the telecommunications and financial services industries, are planned for late 2003 and early 2004.

A final feature of competition advocacy is the persuasive communication to society of competition's advantages. The 1998 Report observed that the CFC "had no program to explain the benefits of competition and competition law enforcement to consumers."⁵⁶ The Report recommended that the Commission seek to broaden its base of support by publicising

agency actions beyond the business press, particularly with respect to cases involving demonstrable consumer benefits.⁵⁷

At the time of the 1998 report, the Commission communicated with the public principally through the agency's website.⁵⁸ The site provides access to a wide range of Commission-related material, including the complete texts of the LFCE, the Commission's Regulations and organisational By-Laws, annual reports, press releases, and selected speeches and public statements. The website also includes the CFC's Economic Competition Gazette, a quarterly journal containing the full text of all resolutions in CFC cases, the Plenum's criteria respecting application of the LFCE, and other documents explicating the CFC's approach to competition policy.

Today, the website retains its expansive coverage,⁵⁹ and the Commission also undertakes a variety of additional diffusion activities. Its media relations office, for example, now issues non-technical press releases in cases of particular interest to consumers. The principal responsibility for outreach is assigned to the General Directorate of Regional Coordination. In 2001, staff of that Directorate made approximately 40 visits to various locations in Mexico to publicise and promote competition policy and the CFC's mission. The audiences for these presentations included local business chambers, professional associations, academicians, and state and local government officers. The Commission reports that 172 such visits were made from late 1998 to 2002, for an average of 43 per year. The Chairman and Commissioners also make speeches and presentations on competition policy to Mexican audiences, such as at the electricity and transportation conferences described above.

6. Conclusions and Recommendations

6.1 Current strengths and weaknesses

The 1998 Report concluded that, with respect to Mexico's competition policy, the analytic quality of the LFCE and its implementing Regulations was a significant strength. A second strength was the consolidation in the CFC of authority to make the market power determinations that trigger government intervention in market operations. The Commission's authority to make such determinations applies not only to its own merger and monopolistic conduct law cases, but to sectoral licensing and natural monopoly regulation as well.⁶⁰ The major weakness identified by the 1998 Report was the lack of a clear base of support for competition policy, either in the government or in society at large. The Report suggested that the lack of such support might account for what appeared to be temporising in some early CFC decisions, and might also underlie the assessment by others in the government and the private sector that the Commission was weak. On the other hand, the Report recognised that the CFC had taken some visible and vigorous actions against prominent economic interests.⁶¹

Five years later, the strengths identified in the initial Report still merit that characterisation, and the perception of an institutional reluctance by the CFC to engage powerful opponents has largely dissipated. Other strengths have come to the fore as well. The Commission has matured into a credible organisation, viewed with respect both domestically and internationally. It pursues its mission according to best principles of management and the highest standards of public service, and has mobilised its limited resources effectively to focus on the matters most relevant to promoting competition policy in Mexico. The CFC's accomplishments are remarkable given the difficult environment in which it operates.

Some CFC strengths have evolved in areas that were the focus of recommendations in the 1998 Report, and it is appropriate to mention them here. The CFC has, as urged, maintained a focus on regulated and privatised sectors, sought to broaden its base of support by publicising its actions to a wider audience and conducting outreach activities, established important international antitrust co-op agreements, and agreed to adopt policy criteria respecting recoupment in predatory pricing cases⁶² and failing firms in merger cases. These actions, and others undertaken by the CFC,⁶³ have contributed significantly to enhancing its reputation.

On the other side of the ledger, the degree of general support for competition policy is still an open question and remains a potential vulnerability. There are indications that the CFC will enjoy an increase in support from the executive branch, but this should not deflect the

Commission from continued efforts to expand its base of popular support. Additional weaknesses arise from certain statutes and judicial processes that constrain the CFC's ability to remedy anti-competitive conduct and market conditions, and from a decline in the Commission's budget and staffing levels. Finally, there are some deficiencies in the Commission's own case litigation procedures, and in its interface with other government entities, that reduce the CFC's efficacy as a law enforcement agency and competition advocate.

6.2 Recommendations

6.2.1 CFC's Relation to the Executive and Legislative Branches

The proposed legislation providing for Senate approval of Presidential appointments to the CFC should be adopted. In its day-to-day operations, the Commission is an independent agency free from direction by either the executive or legislative branches. The agency is not, however, nor should it be, completely insulated from the political dynamic of Mexico. Its independence is mediated through a variety of interactions with those two branches of government, including the budgetary process and congressional hearings. An important point of political modulation occurs when a vacant commission seat is filled for a ten year term. Providing the legislative branch with a role in the appointment process will bolster the Commission's legitimacy as an agency entitled to exercise significant federal power.

The proposed legislation establishing the CFC as a "decentralized" agency should be expanded to provide the CFC with full budgetary independence. This would enable the Commission to present its budget directly to Congress rather than to the Finance or Economics Ministries. If the executive branch considered the CFC's request to be excessive, it would be obliged to make that argument to Congress rather than cutting the Commission's request unilaterally. This change, in conjunction with the provision requiring Senate approval of Commission appointments, will balance legislative and executive branch authority more evenly with respect to the CFC and enhance the agency's stature.

6.2.2 CFC Resources

The Commission employed 8 per cent fewer people in 2002 than it did in 2000, despite a 25 per cent increase in workload (measured by output) during the same period. The Commission's ability to address all of its responsibilities in an effective manner is compromised by resource constraints, and its budget should be increased appropriately. The primary use of additional resources allocated to the Commission should be to hire additional professional staff, with particular emphasis on securing lawyers

of the highest competence. The exposure of the Commission to critical judicial review with respect to nearly every important act it undertakes demands meticulous legal craftsmanship in the preparation and defence of its decisions and procedures.

6.2.3 *CFC Enforcement Authority*

- Tools to detect and attack collusion

The Commission's interest in obtaining authority to conduct unannounced searches for business records faces a significant obstacle in the Mexican Constitution, which limits the government's search and seizure powers to criminal investigations. The Commission could request, and legitimately expect to obtain, statutory authority permitting CFC agents to search business premises after providing notice to the target company. Advance notice, however, would both eliminate the element of surprise and enable the target to seek judicial review. The Commission anticipates that the prime use of search and seizure authority would be to detect surreptitious collusion, but the kind of authority that the Commission is likely to obtain will not be particularly efficacious for that purpose. CFC efforts to acquire more investigative power are unobjectionable, but the Commission should pursue other means to increase its prospects of detecting collusion. One avenue, already identified by the Commission itself, and discussed in the next paragraph, is through the establishment of a leniency program.

The CFC seeks express language in the LFCE so that conspirators who voluntarily reveal collusive agreements to the Commission would receive immunity from (or significant reductions in) monetary penalties. LFCE 36 presently provides that, in assessing fines, the Commission "must consider the seriousness of the violation, the damage caused, the degree of intentionality, the violator's market share, the size of the market affected, the length of the practice or concentration, and the violator's recidivism or background, as well as its financial capacity." While the statute does not forbid the consideration of additional factors (such as cooperation with the CFC), the Commission believes that penalty orders treating co-conspirators differently would be vulnerable to judicial reversal if founded on grounds not specified in Article 36. The Commission should pursue this initiative, but should also recognise that the appeal of any leniency program is materially affected by the seriousness of the penalties assessed against the non-cooperating parties. Therefore, in hard-core collusion cases involving large companies, the Commission should not only consider imposing fines up to the maximum permitted under LFCE 35 IV (about \$1.6 million USD), but also consider invoking LFCE 37 to order an alternate fine equal to the greater of 10 per cent of the violator's annual sales or 10 per cent of the

violator's assets. Further, the Commission should aggressively employ its authority under LFCE 24 III to refer corporate officers to the Public Prosecutor for criminal prosecution and engage the Prosecutor in a project to develop criteria for the filing of criminal complaints in Commission cases.

Additional tools to promote the exposure of collusion should also be considered, such as (1) obtaining authority to offer monetary rewards to lower-level corporate employees who reveal conspiratorial agreements to the CFC; (2) sending investigators into the field to interview customers in suspect markets; (3) scrutinising auctions involving public construction, commodity supply to government installations, and other matters particularly vulnerable to bid-rigging; (4) closely following (and participating at an early stage in) international cartel investigations; and (5) examining domestic industries protected from import competition by anti-dumping duties. Finally, the Commission should explore the possibility that analyzing price information and related data available from other government agencies could help target price-fixing investigations. Particular attention should be directed to the price data maintained by PROFECO.

- Authority to attack and dismantle structural monopoly

As discussed in section 3.3, the 1998 Report suggested that it might be appropriate to vest the CFC with authority to attack structural monopolies. Such authority would apply in circumstances where no unlawful monopolistic practices under the present provisions of the LFCE could be established. The CFC would thus be able to prosecute a dominant firm that exhibited the persistent ability to injure consumers by restricting supply and raising prices.

The most prominent difficulty involved in prosecuting structural monopolies is the development of an adequate remedy. Typically, either divestiture or some form of price control is imposed. Both are problematic measures to implement in an efficient manner, and both ordinarily injure the affected company's shareholders by diminishing asset value. Concerns of this kind underlie the 1998 Report's observation that any such remedial power given to the CFC should be "kept in reserve for occasional use in exceptional, but important, cases."

Structural monopoly legislation being developed by the CFC will likely provoke high controversy once it reaches Congress. The Commission might consider presenting a second less controversial alternative that could ease the way for ultimate passage of full authority. At present, the CFC can employ its investigative powers only to determine the existence of practices that are unlawful under the LFCE. Thus, it cannot investigate merely to ascertain whether a market is hobbled by structural monopoly power. The

CFC should unquestionably have, and should therefore request, statutory authority to conduct investigations for the purpose of examining the practical and economic features of an industry's operation. Using such authority, it could establish whether a structural monopoly existed in a given market and submit a report to Congress with proposed solutions. By demonstrating the existence of an actual structural monopoly, and proposing effective and practicable case-specific remedies, the CFC would be in a stronger position to obtain the necessary remedial authority.

6.2.4 CFC Enforcement Policies & Regulations

The CFC confirms that it takes failing firm considerations into account when analyzing merger cases, and advises that it is developing merger guidelines that will include provisions dealing with failing and bankrupt firms. A reasonable starting point for developing appropriate criteria would be the discussion of the failing firm defence prepared by the drafters of the LFCE. They suggested that an otherwise anti-competitive acquisition should be permitted only if the allegedly failing firm (1) is incapable either of meeting its financial obligations or of reorganizing in bankruptcy, (2) has made a good faith effort to be acquired by an alternate purchaser that would maintain the assets in the relevant market, and (3) would abandon the relevant market if the pending acquisition were rejected.⁶⁴

The Commission should amend its Regulation 21 I to clarify the circumstances in which no pre-merger notification filing is required for restructuring transactions undertaken by foreign firms with Mexican subsidiaries.

6.2.5 Commission Case Procedures

It is in the CFC's self-interest to address practitioner concerns about transparency and bias in Commission proceedings. These two issues are closely intertwined, because an agency decision that is perceived as lacking a fully-articulated basis is also a decision that can easily be seen as reflecting a preconceived agency opinion. The question is not whether CFC resolutions are indeed too cryptic, or whether the Commission does in truth ally itself too closely with complainants in conducting investigations. The fact that some practitioners perceive these things to be so has consequences that seriously impede the Commission's ability to accomplish its mission. First and foremost, the immediate reaction of a party that perceives itself to be unfairly treated is to seek judicial review. An antitrust enforcement agency cannot operate effectively, however, if every investigation it initiates is challenged in court. Second, a party convinced that the Commission has found liability before the case even begins will be more interested in conducting trench warfare than in exploring the possibility of settlement.

Antitrust enforcement agencies will ordinarily generate more economic benefits if a substantial proportion of cases are settled by consent. As the CFC itself has found, litigation is not only expensive and exhausting, but it also generally results in continuation of the anticompetitive practice while the litigation proceeds. A signal benefit of settlement is prompt termination of the offensive practice.

As discussed previously in conjunction with Table 1, during the past five years the Commission obtained settlements in about 17 per cent of the 54 complaint cases that involved either a Commission finding that the LFCE had been violated or in a settlement under Regulation 41. The comparable figure for the CFC's 32 ex officio cases was about 22 per cent. While these percentages are not trivial, the CFC should seek to settle at significantly higher rates.⁶⁵

Perceptions of non-transparency and bias are not the only reasons for the relatively low volume of settlements. Some of the Commission's own case procedures also constrain the settlement rate. For example, a company subject to Commission investigation might be willing to adjust its practices voluntarily to satisfy the Commission's concerns but, under current practice, the investigative target does not even learn the Commission's specific concerns until the preliminary investigation is completed and the Commission issues an OPR commencing formal proceedings.

Another factor influencing the attractiveness of settlement is whether the CFC is able to reduce, or eliminate, fines assessed against a participant that agrees to settle under Regulation 41. This question, which bears most significantly in vertical restraint cases involving a single respondent, differs from the issues associated with granting immunity to a cooperative respondent in a horizontal collusion case. Where the Commission has a cooperating respondent in a horizontal case, it should be seeking much heavier fines than previously against the remaining conspirators, whether or not those parties express willingness to settle under regulation 41. In contrast, for a vertical case, the Commission should be willing to accept a lower fine in order to induce settlement. If the Commission considers that it cannot offer an explicit fine reduction to a settling respondent, it should seek to obtain such authority in conjunction with its legislative initiative respecting leniency.⁶⁶

The complete array of incentives influencing whether a participant in a CFC proceeding will seek to settle the case, pursue immediate judicial relief, or await the outcome of the Commission's process is more complicated than can be fully analyzed here. The point is that the Commission should arrange those incentives to advance competition policy objectives. To accomplish this, the Commission should open a dialog with the Mexican Bar

Association to assess agency practices and procedures. The Bar Association is supportive of competition policy and is interested in cooperating to develop an effective and efficient system for the fair investigation and adjudication of CFC cases.

Practitioners' concerns about the disclosure during amparo proceedings of confidential data in CFC case files should be addressed by adopting appropriate confidentiality regulations. The regulations could be modelled on those issued under Mexico's trade law for application in GATT proceedings.⁶⁷ The existence of such regulations would provide a ready-made reference for use in judicial disclosure orders affecting CFC files.

6.2.6 *Implementation of Commission Orders*

The establishment of a specialised amparo court with economic expertise to hear cases from the CFC (and other agencies that deal with economic issues) should be pursued. The CFC is not the only agency that finds its decisions under review by courts unfamiliar with economic analysis, and it should therefore be able to find allies in seeking legislative action on this point. The existence of such a court may also lead to outcomes more congruent with Supreme Court and appellate tribunal precedents when procedural issues are at stake. Consolidation of all CFC cases in a single court will, at least, avoid the problems posed when multiple amparo cases are filed in different federal courts. Further, whether or not a specialised court is created, action should be taken (by amending the amparo law or otherwise) to prevent amparo courts from granting inappropriate stays of CFC orders during judicial review.

An ancillary feature of amparo cases that warrants mention is the obligation of amparo courts to retain an expert if testimony by a party's expert is admitted. Mexico's Federal Judicial Council establishes (and revises yearly after a public process) a list of experts that federal courts may utilise to identify suitable candidates for employment in judicial proceedings. The current list specifies only one economist. The CFC should encourage universities to list faculty members suitable for retention as court experts in cases arising under the LFCE.⁶⁸

In Fiscal Court cases, the Commission should provide a fuller explanation of its fine imposition decisions, to avoid reversal on that ground. The procedural rules for Fiscal Court cases should be modified so that, in CFC matters, parties seeking review of Commission fine orders will have to post a bond assuring payment if the Commission's decision is sustained. This would avoid any subsequent fine collection issues in such cases.⁶⁹ The procedural rules controlling the review of Fiscal Court decisions by appellate tribunals should be amended to eliminate the existing jurisdictional

amount requirement in CFC cases, so that the Commission may obtain appellate review of adverse Fiscal Court decisions. Finally, the Commission should join with other agencies in an initiative to streamline the procedures that apply to the collection of fines once judicial review is completed.

6.2.7 *CFC Authority in Regulatory Proceedings*

The concerns expressed by the 1998 Report that the CFC might not have an adequate opportunity to participate (or to participate forcefully enough) in sector regulatory proceedings subsequent to a Commission finding of ineffective competition have been borne out, in part, by subsequent events. The Commission played no role in the development of tariff regulations for airports and seaports, and no tariff regulation was ever imposed in the airline transportation sector. The CFC was, however, effectively involved in the establishment of the LP gas distribution price caps and the COFETEL regulations for the five markets in which Telmex was found to possess substantial market power. The 1998 Report's suggestion that CFC approval be a condition for the issuance of sector regulations subsequent to a CFC finding of ineffective market competition is still an attractive option worthy of consideration. It is appropriate to note, however, that COFEMER was created subsequent to 1998, and that any sector regulations issued in the future pursuant to a CFC finding would have to undergo COFEMER's approval after a proceeding in which the CFC could file comments. This process may be sufficient to assure adequate CFC participation.

It would be desirable in any event, however, to implement the 1998 Report's separate suggestion that the CFC be vested with explicit authority to participate in sector proceedings that apply and enforce regulations subsequent to a Commission finding of ineffective competition. Indeed, the CFC's intervention authority should be extended even further to include all proceedings conducted by sector regulators. This is because there are regulatory circumstances (other than those following a CFC finding of ineffective competition) in which CFC involvement is important but in which the Commission now has no formal role. One example, discussed in section 3.4 of this Report, involved Telcel's 2001 application to expand the uses permitted for a its existing spectrum concession. The CFC was able to express an opinion in that proceeding only because COFETEL decided to seek the Commission's views as a matter of discretion. And although COFETEL imposed some conditions on the expansion of Telcel's concession, ostensibly to address the competitive concerns articulated by the CFC, no explanation was provided for COFETEL's treatment of the CFC's opinion. No such explanation was required because the CFC was not a party. To assure adequate treatment of competition policy issues, the CFC should have a formal right to participate in all regulatory agency

proceedings, either through a generally available public comment period or through a procedural regulation tailored specifically for the CFC. Further, the regulatory agency responsible for resolving the proceeding should be obliged to reply on the public record to the CFC's comments.

The Commission's project to develop structural monopoly legislation responds, in part, to the recommendations in the 1998 Report respecting Commission involvement in trade law proceedings. Regardless of that project's outcome, the economic development program being prepared by the executive branch should include provisions vesting the Commission with authority to block anti-competitive decisions in the application of the trade laws. If the executive branch adheres to its position that competition policy will play a stronger role in Mexico's economic program, the CFC should be well positioned to recommend modification of Mexico's trade law system. In the meantime, the Commission should seek opportunities to publicise the economic costs that trade law proceedings impose on the Mexican economy.

6.2.8 *Competition Advocacy*

COFEMER advises that its regulatory review process addresses numerous proposed rules not previously vetted by the CFC. The CFC should not limit its involvement in COFEMER activities to participation in the advisory council and submission of comments upon specific request. The Commission should immediately establish a program to monitor COFEMER's regulatory postings, identify proposals that warrant comment, and submit appropriate statements on the record by the applicable deadline. COFEMER'S public review proceedings provide an excellent opportunity for the Commission to enhance both its visibility and its impact on the day-to-day operations of Mexico's regulatory processes.

6.2.9 *Developing a Base of Support for Competition Policy*

The CFC should establish a much closer relationship with PROFECO. As noted above, PROFECO is a source of market data that could be useful in detecting collusive behaviour. Beyond that, and more critically, PROFECO has an unmatched capacity to communicate with the consuming public, and is willing to employ that capacity to aid the CFC. This is an opportunity that the Commission should embrace, especially given that Mexico has no national, private-sector consumer organisation. PROFECO is a highly visible agency, publishing an attractive and popular consumer magazine, presenting radio and TV programs, and cooperating with the Education Ministry to develop consumer educational materials for use in schools. The CFC could employ the tools offered by PROFECO to implement a more effective program for communicating the benefits of competition to the public. The CFC as an agency, and competition policy generally, would both

benefit from consumer magazine articles about Commission actions that have a practical impact on everyday life. The CFC's cases involving price-fixing of consumer commodities are prime candidates for coverage, but other kinds of cases (like those involving beverage exclusivity arrangements) may qualify as well. And competition issues in more complicated markets, such as telephone services and LP gas distribution, could also be explained in a consumer-friendly way.

Finally, the CFC should attempt to communicate more directly with major business organisations not involved in the regulated sectors of the economy. The APEC conferences constitute a model vehicle for discussing competition policy principles as they apply to actual business operations, and the CFC should employ some version of that model to arrange and facilitate interaction with national business organisations and the national consortia of business chambers.

NOTES

1. Background Report on the Role of Competition Policy in Regulatory Reform, in OECD, *Regulatory Reform in Mexico* (1999), also published as Wise, M., *Review of Competition Law and Policy in Mexico*, OECD J. Competition Law & Policy, vol. 1, no. 4, p. 43 (1999). See country reviews under subtopic www.oecd.org/competition.
2. Although the Mexico City airport is designated for privatization, it remains a government facility at present. The situation may change when (and if) the site for a new airport is selected. The government also manages 23 other airports that operate at a loss and for which privatization is not contemplated. Several short railway routes likewise remain in government hands.
3. North American Free Trade Agreement, Art. 1501(1). The competition law was being prepared during the same period that Mexico was negotiating NAFTA, although the law was adopted before NAFTA came into force.
4. The Competition Law was published in the Official Journal of the Federation on December 24, 1992, and came into force on June 22, 1993.
5. Article 2, Federal Law of Economic Competition (LFCE).
6. See Fernando Sanchez Ugarte, CFC Chairman, "Competition Policy in Economic Development" (2002). This address, presented in conjunction with the Ninth Anniversary of the CFC, is available on the CFC's website at www.cfc.gob.mx.
7. p. 185.
8. Constitution, article 28.
9. p. 185.
10. One chamber of the Supreme Court has held that the Commission's authority to impose fines under LFCE article 34, section II is unconstitutional because the statute contains no standards for determining the size of the fine. This decision, however, conflicts with a thesis established by another chamber of the Supreme Court, holding that statutory fine provisions are constitutional if they limit the imposing agency's discretion by establishing a maximum.
11. Pemex, for example, has been subject to several actions by the CFC for practices outside the sector in which it enjoys constitutional protection.
12. Besides these legal requirements affecting the organisation of export associations, LFCE 6 also specifies that the product exported by the trade association must be the exporting

- region's prime source of wealth, must not be an essential commodity, and must not be traded within Mexico.
13. The status of this power is now in question. On January 6, 2004, the Supreme Court declared articles 14 and 15 of the LFCE to be unconstitutional.
 14. The role of CRE in natural and LP gas is more prominent than in electricity because the latter sector is still largely state-owned.
 15. 1994 CFC Annual Report, p. 28.
 16. An example is the Commission's action, settled by consent in 2002, against price fixing in the vitamins market (File IO-09-99).
 17. Until 2001, the Ministry of Economy was designated as the Ministry of Trade and Industrial Promotion, or SECOFI.
 18. Thus, unlike in most other OECD countries, resale price maintenance is not subject to a *per se* prohibition.
 19. Regulations 9 through 13. The discussion in these provisions is also applicable to the relevant market and market power issues involved in analyzing mergers. It is worth noting that the treatment of market definition in Regulation 9 expressly states that the Commission will seek to identify all substitute products "whether domestic or foreign." Although the Commission often defines markets as national because of consumer preferences, product distribution conditions, and other factors affecting supply and demand, it routinely considers the implications of actual and potential imports and foreign investment in assessing the market power of firms operating in Mexico.
 20. The predatory pricing standard set out in the 1998 Regulations was developed in deciding this case.
 21. p. 205.
 22. p. 190.
 23. p. 208.
 24. Regulations 9 through 13.
 25. Published in the *Diario Oficial*, 24 July 1998, p. 20.
 26. The transaction might qualify for the post-consummation notification provision applicable to restructuring transactions under Regulation 21, section II, but only if the parent had held the controlling shares for the preceding three years. The CFC, however, does not consider that even a post-transaction notification requirement is necessary in the circumstances described.
 27. While most merger cases arise from pre-merger notification filings, these totals also reflect cases following from complaints filed with the CFC and from *ex officio* investigations initiated by the Commission itself.
 28. p. 193.
 29. p. 205.
 30. pp. 208. In an extension of that discussion, the 1998 Report also suggested creation of a single agency to administer sector regulations for all controlled markets. *Id.*

31. pp. 194, 208.
32. LFCE 32. Both domestic and foreign firms have the same right to file complaints under the applicable procedures.
33. Two appellate courts have ruled that the Commission has no statutory basis for denying participant status to complainants in pending merger cases. The Supreme Court has not spoken on this issue, but the Commission may be obliged either to extend participant status by amending Regulation 26 IV, or seek an amendment to LFCE 32.
34. Regulation 30.
35. LFCE 33, section IV.
36. The CFC estimates that redactions are made in only 15 percent of the resolutions that it issues, and that the amount of text deleted from any given resolution is tiny (less than 2 per cent).
37. The Commission did not previously place those items on the public record, and they were not otherwise disclosed unless the case file was released during judicial review.
38. p. 191.
39. This approach, which would effectively constitute the CFC as a tribunal to hear private antitrust cases, appears to be legally permissible under the bare-bones procedural framework in LFCE 33.
40. Richard D. Baker, *Judicial Review in Mexico: A Study of the Amparo Suit* (1971) at 128. See also *id.* at 268, concluding that, with respect to reviewing agency action, the constitutional jurisdiction of Mexico's judiciary is comparable to that federal judiciary in the United States.
41. An *amparo* challenging a final resolution of the CFC may not be filed until the party has sought and received Commission reconsideration under LFCE 39.
42. The *amparo* procedural rules provide a mechanism for consolidating before one court all of the *amparo* actions relating to a given agency proceeding. Any consolidation ordered, however, is at the discretion of the judges involved, not a matter of right.
43. In this respect, the district courts have been ignoring a series of appellate tribunal decisions holding that *amparo* courts cannot stay CFC orders during judicial review.
44. p. 208.
45. p. 197.
46. p. 208.
47. The ratios of relative to absolute cases are not exactly congruent with the ratios of vertical to horizontal cases because, under the LFCE, all absolute cases are horizontal but not all relative cases are vertical. This means that the actual ratios of vertical to horizontal cases are lower than the ratios cited in the text.
48. The raw data respecting fines ordered by the Commission appear to show a stronger emphasis on relative cases compared to absolute cases. The average fine imposed as a sanction by the CFC in the period 1998 through 2002 for relative monopoly cases was \$4.20 million pesos (or \$399,000 USD). The average fine imposed for absolute monopoly

- cases was only 44 percent of the relative cases figure, standing at \$1.84 million pesos (or \$175,000 USD). In fact, however, most of the fines ordered for relative monopoly practices in that period were assessed against Telmex or its affiliate Telcel: 15 fines totalling \$151.2 million pesos (or \$14.3 million USD), representing 86 percent of all relative practice fines imposed as a sanction from 1998 through 2002. If the fines against Telmex are removed from the data, the average fine in relative practice cases drops significantly to \$930,431 pesos (about \$88,300 USD).
49. p. 207.
50. LFCE Article 24, sections IV and V. Under the Commission's internal regulations, authority to issue commentary under section IV is delegated to the Chairman, while the Plenum reserves to itself the exercise of authority under section V.
51. LFCE Article 24, section VI. This authority is also reserved exclusively to the Plenum.
52. The Executive Secretary, acting with the Chairman's agreement, is authorized to issue opinions of this kind. The Plenum, however, may choose to resolve such requests itself, as it did in the consultations respecting CINTRA and Radio Móvil Dipsa (Telcel), discussed in section 3.4 of this Report.
53. The CFC considers proceedings under Article 14 to constitute competition advocacy rather than law enforcement, because a Commission determination that an interstate trade barrier exists entails no mandatory effect.
54. p. 207.
55. p. 207.
56. The CFC considers proceedings under Article 14 to constitute competition advocacy rather than law enforcement, because the Commission's determination that an interstate trade barrier exists entails no mandatory effect.
57. p. 208.
58. At www.cfc.gob.mx.
59. A significant portion of the website material is also available in English.
60. p. 205.
61. pp. 205-06.
62. The Commission's stated intention to frame its recoupment criteria in terms of "good probabilities" of predation cost recovery appears unobjectionable. When the Commission formally acts on recoupment, it should also consider including in its predatory pricing criteria the cost determination principles articulated in the June 6, 1996, Warner-Lambert resolution.
63. Some relatively inconspicuous but nonetheless praiseworthy examples are the CFC's actions in maintaining an excellent website, obtaining ISO certification, and organizing the APEC-sponsored sectoral conferences.
64. Castañeda, Gabriel, Santiago Levy, Gabriel Martínez and Gustavo Merino. "Antecedentes Económicos para una Ley Federal de Competencia Económica" El Trimestre Económico, Fondo de Cultura Económica, México, vol. LX (1), (January-March 1993), No. 237, pp. 230-256, at p. 247.

65. By comparison, during the period 1998 to 2002, the United States Federal Trade Commission resolved 86 per cent of its non-merger antitrust cases by settlement.
66. Both the leniency program and Regulation 41 settlements also raise issues respecting the exposure of cooperating participants to private damage claims under LFCE 38. The CFC should consider whether it needs additional statutory authority to address concerns of that kind.
67. See Title 8, Chapters III and IV, of the trade law regulations published in the *Diario Oficial* on December 30, 1993.
68. *Diario Oficial*, Dec. 13, 2002, p.56. It is also worth suggesting that faculty members who are listed as experts consider adjusting their professional fees to accommodate the judiciary's budget.
69. In *amparo* cases that involve review of CFC decisions imposing a fine, the applicable procedural rules already permit the Commission to request that the appellant post a bond assuring payment if the Commission's decision is sustained. Requiring a bond is, however, within the court's discretion, and this procedure should be revised to so that such a bond is required in every CFC fine assessment case.