

MEXICO

Unilateral Conduct Working Group Questionnaire

In case you have any questions on the questionnaire, please contact Elizabeth Kraus at the US FTC or Arno Rasek at the Bundeskartellamt. Please send the completed questionnaire by 31 October 2006 to ekraus@ftc.gov and arno.rasek@bundeskartellamt.bund.de, and provide a contact person who can answer possible questions on your response.

A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

a. Constitution

Competition legislation stems from article 28 in the Constitution, which opens with a general prohibition of “monopolies, monopolistic practices, government monopolies ... in the terms and conditions dictated by laws” and provides broad and general guidance about the acts or conducts that are prohibited in the United Mexican States:

(1) “all concentration or hoarding in one or a few hands of basic commodities with the object of raising prices”,

(2) “all agreement, process or combination undertaken among producers, industrialists, tradesmen or service entrepreneurs, aimed at preventing free market access or competition among themselves and forcing consumers to pay exaggerated prices”, and

(3) “whatever constitutes an undue exclusive advantage in favor of one or more persons and against the public in general or some social class”.

Unilateral conduct, then, is contained within the last general prohibition, and broadly speaking, it describes exclusionary or predatory practices as opposed to collusive practices, which are contained in the second prohibition listed here.

b. Statutes

The 1992 exposition of motives for Mexico's competition law,¹ noted that fostering competition and free market access was a necessary and natural complement to the economic changes that the country had embarked on. This document, which preceded the presentation of the Bill that would become the Federal Law of Economic Competition (LFCE or the law), remarked that in a monopolized market, both the quantity and quality

¹ The preamble to the law, outlining its content, legal basis, spirit and intent.

of goods and services was inferior to those produced under competition. Hence, monopoly was inefficient and led to losses in social welfare, as it hampered the country's chances to develop towards its full economic possibilities and permanently reduced its economic wealth.² With this as a starting point, competition policy in Mexico has been chiefly concerned with efficiency.

The law repeats and clarifies the general prohibition in article 28 of the Constitution. Its object is to protect the process of competition by eliminating monopolies, monopolistic practices *and other restrictions to the efficient functioning of markets* (emphasis added).³

Two articles in the LFCE characterize illegal conducts into two broadly defined categories: horizontal (absolute monopolistic practices) and vertical (relative monopolistic practices). Absolute monopolistic practices only include hard core cartel conducts,⁴ which have no legal effects and constitute a *per se* violation of the LFCE. Whereas relative monopolistic practices, described under article 10 of the LFCE, include price and non-price vertical restraints, exclusionary group boycotts, discrimination in price and sales conditions and other forms of unilateral conduct.

Because the Federal Competition Commission's (CFC or Commission) mandate is to protect economic competition, to promote and prevent harm to this process, not the parties involved in this process, in the case of relative monopolistic practices, it is the Commission's task to determine whether displacing or excluding an economic agent simply constitutes harm to an individual competitor, supplier or client or whether competition itself has been harmed, in which case it must act against the economic agent undertaking the illegal conduct.⁵

c. Regulations

While a new code of regulations to the reformed law is still being drafted, articles in the current regulations to the LFCE that clarify some of the objectives set out in the law regarding unilateral conduct rules are:

- Article 6: efficiencies
- Article 7: other relative monopolistic practices, that is, unilateral conduct rules

An English transcription of article 6 is offered in the response to question 2. Article 7 was considered unconstitutional and the reforms to the law have incorporated these relative

² *Exposición de motivos de la LFCE*, available in the Federal Competition Commission's website:

<http://sp.cfc.gob.mx:8080/cfc01/Documentos/Esp/Normatividad/Exposición%20de%20motivos%20de%20la%20LFCE/index.htm>

³ Article 2, LFCE.

⁴ The definition for hard core cartel conduct is taken from the International Competition Network. 2005. *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties: Building Blocks for Effective Anti-Cartel Regimes*, vol.1. Report prepared by the ICN Working Group on Cartels. ICN 4th Annual Conference. Bonn, Germany.

⁵ For a more detailed economic analysis of competition law, refer to González de Cossío, Francisco. 2005. *Competencia Económica: Aspectos Jurídicos y Económicos*. México: Porrúa.

monopolistic practices under the new article 10 of the law – also transcribed in the response to question 2.

d. Agency enforcement policy (*e.g.*, guidelines, speeches)

Thus far no guidelines have been issued regarding unilateral conduct.

e. Case law

Thus far no relevant case law has been developed.

f. Other (please identify)

There are no additional sources of unilateral conduct rules.

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

The objectives are based solely on competition policy goals, as the reading of article 2 of the LFCE illustrates, which are subsumed in an efficiency-based analysis of anticompetitive conduct. Other non-competition provisions or doctrines about “fairness” or “fair competition,” for example, or about protecting the interests of small enterprises or limiting industrial concentration are absent from the law. Although the law is part of a program to develop a more market-oriented economy, it 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.

3. If there are multiple objectives, how are these balanced or reconciled?

Does not apply.

4. How has your jurisdiction balanced the risks associated with over-deterrence (deterring efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

The assessment of unilateral conduct follows a rule of reason approach that requires the CFC to determine: (1) whether the alleged responsible agent possesses market power; (2) that the conduct is intended or has the effect of unduly displacing or hampering access to other agents; and (3) whether an agent’s efficiency defense for their allegedly anticompetitive conduct offsets potential competition concerns arising from the conduct. This methodology is suited to pursue the efficiency objective of unilateral conduct rules and adequately addresses any over-deterrence concerns.

On the other hand, unilateral conduct investigations begin either in response to a complaint or “ex officio” at the Commission’s own initiative, thus allowing the CFC to proactively combat illegal conduct in sectors that it considers prone to feature lack of competition. This faculty deals with under-deterrence risks.

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

As mentioned before, the LFCE regulates the anti-monopoly provision stated in article 28 of the Constitution. This article prohibits monopolies, monopolistic practices and state monopolies. However, it also establishes that functions exclusively exercised by the State in “strategic areas” are not deemed to constitute monopolies. Currently, article 28 identifies the following “strategic areas”: the functions of the central bank in producing coins and paper currency, postal services, telegraph and radio, petroleum, and other hydrocarbons, basic petrochemicals, radioactive minerals, nuclear energy and electric power.

This article also states that exclusionary privileges granted to copyright and patent holders, and labor and export trade associations will not be deemed to constitute monopolies.

Several provisions in the LFCE set boundaries to these exemptions. Article 4 asserts that state enterprises will be subject to the law with respect to those practices not expressly exempted in the constitution. Articles 5 and 6 stipulate similar boundaries for conducts undertaken by labor associations, copyright and patent holders, and export trade associations.

The exemption of copyright and patent holders is consistent with the general goals of unilateral conduct legislation, especially when considering the boundaries set in LFCE. It intends to protect intellectual property, while preventing its abuse through unilateral monopolistic practices.

However, the exemptions conferred to state companies in “strategic areas” conflict with the goal of promoting economic efficiency. Although article 28 of the Constitution stipulates that the State must have the “... required enterprises to effectively manage strategic areas...”, state monopolies are characterized by low productivity and inefficient allocation of investments, as well as expensive and poor quality products and services. In practice, these exceptions have constituted an obstacle for an efficient development of the energy and postal service sectors, which has deteriorated consumer welfare and the competitiveness of the economy.

Additionally, state enterprises have leveraged their position in “strategic areas” to undertake anticompetitive practices in downstream markets, which are beyond the scope of constitutional exemptions.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (e.g., small, transition, or recently-liberalized), please explain.

While the objectives of Mexico's unilateral conduct rules are independent of non-competition influences as stated in question 2, because of the "recently-liberalized" nature of the Mexican economy, the Commission has additional powers in the case of regulated sectors. It is empowered to declare the existence of a dominant agent (in telecommunications) or an absence of effective competition conditions (in other regulated sectors), which triggers price or other type of regulation by the corresponding sectoral agency. Article 24 of the law describes powers relating to the declaration of a dominant agent, Telmex.

Regarding effective competition, although the concept has a broader meaning than just the possession of market power, in practice the CFC makes such a determination when it finds that an economic agent has substantial market power (SMP) in the relevant market. Nevertheless, the CFC is fully aware that the absence of effective competition may be due to structural characteristics of the market, even if none of the participants has SMP. In some cases, these characteristics may justify the imposition of price controls as foreseen in article 7 of the LFCE. The role played of the Commission is intended to ensure that such price controls are justified in terms of efficiency and that other CFC powers are complemented, particularly since the law provides no remedies or sanctions for abusive or exploitative pricing by dominant firms. Finally, for some regulated sectors, economic agents who wish to bid in public auctions or apply for a concession, license, or permit, must first obtain the CFC's favorable opinion. The CFC may choose to reject, approve or condition the applicant's participation.

The choice of objectives for unilateral conduct rules (which are in fact the objectives of the competition law as a whole) was certainly influenced by the recently-liberalized nature of the Mexican economy. The choice of "efficiency" as an objective for competition law stemmed from an acknowledgement that inefficiency hampers the country's chances to develop towards its full economic possibilities and permanently reduces its wealth. Further, the enactment of this statute was 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. Competition policy, was thus intended to cement a general market-liberalizing reform program that also comprised ending price controls, liberalizing trade and investment, privatizing state enterprises, and reforming regulation.

On the other hand, exemptions to the law, as explained above, derive from a constitutional provision. In 1995 the list of strategic areas was reduced as part of the reform effort: satellite communications and railroads were excluded and declared priority areas instead, which allowed for their privatization.

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

With the recent reforms (enacted June 29th, 2006), the objectives of the law as stated under article 2 have not changed. The scope of the law and exemptions were clarified under articles 3, 4, 5 and 6, noting that economic agents are only exempted from the law

within the scope of the privileges granted under the Constitution but no further. In other words a state monopoly, for example, cannot claim constitutional privileges in a downstream market and the law now foresees limits to how far a claim of intellectual property rights can be upheld along a distribution chain (so far the Commission has not reviewed a case where a formal stance can be inferred regarding IPRs).

In addition, the mechanism by which the federal executive power can control or set prices, was newly established under article 7. It now requires that the CFC issue a declaration that there is an absence of effective competition conditions in the relevant market, before the Ministry of the Economy can set these prices. As in the previous version of this article, prices must be set in such a way that ensures adequate supply in the market and endeavors to minimize adverse effects on the process of competition and free market access.

With the reforms to the law, the Commission can issue two types of opinions: a non-binding opinion, as before, but with the requirement that it now be made public; and a binding opinion, also to be made public, which can only be vetoed by the President of the country, also through a public opinion. The binding opinion applies only to the federal public administration regarding programs, policies, bills, rulings, agreements and administrative acts in general, that may adversely affects the process of competition and free market access.

A reform to article 37 was intended to strengthen CFC powers with respect to regulated sectors by allowing it to impose stricter remedies. The CFC can now decide that assets, shares or rights be divested as necessary so that recidivists who possess substantial market power cease to have it. However, enforcement of this decision is subject to a judicial order.

In addition to the new practices that are now included in Article 10 of the LFCE, a final paragraph was added which explicitly states that efficiency considerations are weighed in during the analysis of relative monopolistic practices.

8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

The CFC's determination of ineffective competition in regulated markets triggers the powers of sectoral regulators to impose additional regulations (such as tariff regulations) and prevent the abuse of substantial market power. However, in some instances regulators have taken no actions following this determination, thus allowing dominant players to continue exploiting their market power. For an effective regulation of dominant players in regulated sectors, a strengthened CFC role is required following its determination of ineffective competition.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

State Owned Enterprises (SOE)

In many cases SOEs extend their activities beyond their strategic areas, and participate in markets where they co-exist and compete with the private sector. Although competition legislation and sector specific regulations provide no exceptions or favorable treatment to these activities, SOE specific regulations and corporate governance rules may distort competition. The CFC has continually challenged anticompetitive conducts by the SOEs. However, in order to truly attain competitive neutrality, it is necessary for SOEs to face similar forces as their private counterparts regarding their economic performance on a stand alone basis, which lies beyond the reach of competition legislation.

Competition culture

A major obstacle in achieving the goals of unilateral conduct legislation in Mexico is a lack of competition culture. Competition is far from being the normal way of organizing national life. Obtaining and keeping privileges granted by the state at the expense of public budgets or special provisions in laws and policies is still embedded in the Mexican business culture. In addition to enforcing the LFCE, the CFC has to aggressively advocate against legislative and regulatory reforms that grant privileges to specific interest groups.

A recent example is the debate that has ensued over the last year about a draft law intended to promote books and reading by establishing a fixed price to be determined by editors. The CFC was originally invited to issue an opinion over a year ago, an opinion which was disregarded by Congress as it approved the law in both houses. The Commission, together with a number of ministries and the office of the President, lobbied hard to have it vetoed, because it considered that the law created incentives for prices to rise and would therefore harm readers. The law, of course, has the backing of authors, editors, publishers and booksellers who consider that adopting a fixed price for a given edition of a book will promote the development of the industry. The President vetoed this law on September 1st, but industry representatives have pledged to take their bill to the next Congress. The CFC will continue to do its part in ensuring that competition and consumers are not harmed by special industry interests.

The reforms to the LFCE approved in April 2006, and enacted in June 2006, empowered the CFC to issue opinions regarding secondary regulations that are binding on administrative authorities and to issue public opinions on initiatives to reform legislation. These new faculties will facilitate the efforts of the CFC in advocating in favor of pro-competitive regulations.

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., "super dominance").

The LFCE does not provide a definition of substantial market power (SMP), but article 13 outlines the criteria to be used when evaluating whether a specific agent has this power and it may be argued that section I, implicitly defines SMP when specifying that the CFCCFC must evaluate “...*whether it can unilaterally fix prices or restrict supply in the relevant market, without competitor agents being able to actually or potentially offset such power*”.

Since there is no explicit definition of SMP, there is no distinction between degrees of market power or stipulations on its duration. However, any determination of market power is related to a defined relevant market which includes both geographical as well as temporal dimensions.

The LFCE addresses two types of proceedings before the CFCCFC that are based on the concept of SMP: (i) relative monopolistic practices, which include unilateral conduct considered illegal; and (ii) declarations on competition conditions that are required to trigger specific sector regulations.

(i) Relative monopolistic practices

Under the law, relative monopolistic practices are anti-competitive unilateral behaviors, and include abuse of dominance or monopolization as well as vertical practices. These cases are reviewed under a rule of reason analysis, which takes into account whether the economic agent allegedly responsible for anticompetitive conduct possesses substantial market power in the relevant market.

Article 10 of the LFCE defines relative monopolistic practices as those that “... improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favor of certain persons”. The law typifies eleven specific conducts: (I) vertical market division, (ii) resale price maintenance, (iii) tied sales, (iv) exclusive dealings, (v) refusals to deal, (vi) boycott, (vii) predatory pricing, (viii) fidelity or loyalty discounts, (ix) cross-subsidization, (x) price discrimination, and (xi) raising rivals’ costs.

(ii) Declarations on market power

Most sectoral regulation requires that the CFC determine the absence of effective competition before regulators impose additional regulations (price, access, and other) on all market participants. In telecommunications, the sectoral legislation requires that the CFC find an economic agent with SMP to trigger additional regulations on it.

While the concept of effective competition has a broader meaning than SMP, in practice, the CFC determines the absence of effective competition when it finds that an economic agent has SMP in the relevant market.⁶ However, the absence of effective competition may also be due to other structural characteristics of the market, even if none of the participants has SMP.

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

⁶ See, for example, the declaration of the absence of effective competition in airport groups, such as GAP (file AD-24-99)

- If dominance/substantial market power is present yes
- Acquisition or creation of dominance/substantial market power no
- Attempt to acquire or create dominance/substantial market power no
- Other (please identify)

Why did your jurisdiction choose these stages?

As explained in the answer to the previous question, SMP determinations are associated with two types of proceedings, both of which require the CFC to analyze prevailing market conditions and to apply remedies if anticompetitive conduct arises from an agent with SMP. The LFCE does not prosecute the acquisition or attempted acquisition of market power through unilateral conduct rules; instead, this is type of analysis and, if applicable, the remedies that stem from it, belong to the merger review process and to the assessment of participants in public auctions. Recent amendments, however, do empower the Commission to deal with a monopolistic structure the recurs in its anticompetitive conduct by deciding that assets, shares and rights be divested as necessary.

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/ or as a “safe harbour”? no

Under the assessment followed by the CFC high market shares or concentration indices are not a sufficient condition to conclude that an agent possesses SMP.

If so, please respond as applicable:

- What is the market share level of the dominance presumption? _____
- Is the dominance presumption rebuttable? yes/no
- What is the market share level of the safe harbour? _____
- Is the safe harbour absolute (*i.e.*, dominance/substantial market power cannot be found below the specified percentage level)? yes/no
- What is the legal basis of the presumption statute /case law/guidelines
- What is the legal basis for the safe harbor? statute /case law/guidelines

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ? no

The LFCE does not establish a SMP threshold. However a finding of SMP is required under the rule of reason approach followed by the CFC to prevent and correct unilateral conduct. As explained above, in the proceeding leading to a declaration of market power, a SMP determination itself is what triggers regulation, in practice.

If so, please explain why and in which circumstances.

5. Does your jurisdiction's analysis of dominance/substantial market power first require that a relevant product and geographic market be defined? yes

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?⁷

- Market share of the firm and its competitors yes
- Market position and market behavior of competitors yes
- Durability of market power no
- Barriers to entry or expansion yes
- Economies of scale and scope/network effects yes
- Buyer power yes
- Access to upstream markets/vertical integration yes
- Access to essential facilities yes
- Market maturity/vitality no
- Financial resources of the firm and its competitors yes
- Profits of the firm yes
- High prices (at absolute or comparative level) yes

Please specify any other criteria that you use to assess single-firm dominance/substantial market power.

Additional factors the CFC considers in evaluating whether an agent has SMP are the agent's recent behavior, lack of access to imports or high costs of moving them within the border, and costs faced by users to switch providers.

Efficiency gains arising from the alleged illegal conduct are also weighed in the assessment of relative monopolistic practices in order to determine whether the net benefit to consumers offset any anticompetitive effects. A non-exhaustive list of efficiency gains is provided in article 10 of the law: introduction of new products; use of perishable or imperfect products; cost reductions derived from new production techniques, asset integration, increased scale of production or production of different goods or services with the same inputs; technological improvements that generate enhanced output; combining assets or investments and recovery that improve quality and attributes of goods and services; quality and investment enhancement; service and punctuality that positively impact the distribution chain without significantly increasing prices, reducing consumer options, or restraining innovation. The Regulations in force, currently under review, also set out a list of efficiency gains that includes: lowering administrative costs significantly; transferring production technology or market know-

⁷ The answer "yes" should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer "no" should be provided if in practice you have not ever used that criterion.

how; reducing production or trade costs as a result of an expansion of an infrastructure or distribution network in addition to economies of scope and scale.

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

Please refer to the answer to question 8 below.

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

Market power determinations are carried out on a case-by-case basis, and there are no specific thresholds that may be used in these assessments. Article 13 of the LFCE and article 12 of the Regulations provide a comprehensive list of evidence that must be considered when evaluating whether an agent possesses SMP, but without prejudging on the specific weight each has in the overall assessment.

Article 13 of the LFCE includes the following elements:

- the agent's market share and its ability to unilaterally set prices or restrict supply;
- the existence of barriers to entry and any elements that may foreseeably alter those barriers;
- the existence and market power of other competitors;
- access to inputs by the agent and its competitors;
- the agent's recent behaviour.

Article 12 of the Regulations complements this list with additional criteria:

- Market positioning of the agent's goods or services.
- The lack of access to imports or high costs of moving them within the border.
- Costs faced by users to change providers.

Article 11 of the Regulations elaborates on the types of elements that can be construed as barriers to entry when undertaking this analysis. Section I of this article considers capital requirements, that is, "financial costs or the costs of developing alternative channels". It also considers whether financial markets are efficient: that is, if conditions of "limited access to financing" exist. Section II takes into account adjustment costs, "[the] term for recouping the required investment", and whether costs are effectively sunk, "[the] return for alternative uses of infrastructure and equipment". Section IV takes into account fixed costs such as advertising and investments in brands or trademarks. Marketing and business practices lie within the definition of barriers provided in section VI. Finally, sections III, V, and VII consider normative barriers: regulation and regulatory actions,

including the use of intellectual and industrial property as barriers to entry, and regulation relating to international trade as a special case of barriers to entry.

As explained above, efficiency gains are also weighed in the assessment of unilateral conduct in order to determine whether the net benefit to consumers offset any anticompetitive effects.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

Intellectual property rights are not presumed to create SMP, they are actually exempted from the constitutional monopoly prohibition by expressly stating that they are not deemed to constitute monopolies. However, article 5 of the LFCE stipulates that holders of these rights are subject to the law regarding conduct not expressly comprised within this constitutional exemption. This boundary intends to protect intellectual property while preventing its abuse through monopolistic practices, for instance by unduly extending the scope of the rights to create entry barriers. Trademarks, on the other hand, may have the effect of positioning firms, and are thus considered in the assessment of market power. In a particular case, the CFC considered that the decision of an inventor to grant a limited number of licenses was not a practice that violated the law.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? No

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [**NB:** Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]

Does not apply.

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

The rule of reason approach followed by the CFC in the assessment of SMP is intended to ensure that unilateral conduct is only prosecuted if the agent has the ability to affect the efficiency objective set out in the unilateral conduct rules.

C. State-created Monopolies

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms*, *energy*, *water*, and *railways* sectors.

I. State-created Monopolies

1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned⁸, state-controlled⁹, state-enabled or facilitated¹⁰, recently privatized and/or liberalized, regional monopolies,¹¹ etc.

The other state-created monopoly in Mexico not comprised within the definition of telecom, energy, water or railways is the Postal Service, considered a strategic area. It includes the reception, transport and delivery of mail and is provided by SEPOMEX. SEPOMEX is in charge of providing mail universal service and competes with private agents in offering other services such as courier and package. Over the last few years SEPOMEX’s market share had been decreasing although it still remains the major participant due to its broader coverage.

2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.¹²

Refer to previous answers regarding strategic sectors as well as answers relating to the rationale for privatization of state enterprises (question 5 in this section).

⁸ Those undertakings that are 100% owned by the State.

⁹ The control belongs to the State, without taking into consideration the amount of the % of the State share.

¹⁰ E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

¹¹ Includes public/private undertakings that are granted exclusive rights within a certain region.

¹² The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:

- Legal restrictions/scope of application: Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?

Legal restrictions exist in so far as these monopolies belong to the "strategic sectors" described by Constitutional article 28, in which case, according to the law they are exempted from the monopoly prohibition. Again, the caveat that these sectors not use their power in upstream or downward markets under threat of prosecution by the competition authority still holds.

- Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.

Does not apply. The CFC has technical and operative independence.

4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?

It should not change.

II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies

5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law) ?

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. Prior to its enactment the government had ended most domestic price controls and reduced entry constraints. For example, 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.

The government also undertook to privatize 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 privatized in 1991 and 1992, for a total of \$US 13 billion. Public firms in steel, sugar processing, airlines, TV broadcasting, satellites, airport¹³ and seaport facilities, and railroads¹⁴ 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.

Privatization of state enterprises 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 have been restored to private ownership, but the other three sectors await resolution.

Privatization 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.

Because some of the privatized 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 maximization 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.

The Inter-ministerial Privatization Commission (CID) was created in 1995 with the purpose of establishing the framework for industry privatization proceedings, and to guarantee adequate coordination, monitoring, and transparency of privatization actions. The CID's organic statute¹⁵ provides that the CFC be a permanent guest, and sets guidelines for the privatization process which establish the following obligations for the CID:

- defining the privatization strategy (scope, time and modality)
- reviewing the regulatory framework and proposing modifications to provide legal certainty, eliminate entry barriers and prevent possible monopolistic practices.
- recommending the financial scheme for privatization in order to prevent risks that may negatively impact public finances.
- resolving on the winning bid.

The operative stages of the privatization process are the responsibility of the sector coordinator.

¹³ Mexico City airport remains a government facility at present. The government also manages 23 other airports that operate at a loss and for which privatization is not contemplated.

¹⁴ Several short railway routes remain in government hands.

¹⁵ Published in the Official Journal on April 7, 1995

6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?

The common objectives of privatization processes were set out in the statutes of the CID in 1995:

- Contribute towards a more efficient economy in order to support competitiveness and the generation of permanent, productive jobs.

- Favor a more participatory economy that offers greater opportunities to enhance the standard of living of Mexican people.

- Favor the dynamic enhancement of productive sectors, by facilitating the introduction of new technologies, access to financing needed for their expansion and the development of human resources.

- Make privatization of state-owned entities and assets an integral part of the general structural change, with a mid and long term view.

- Support competition policies in the economic sectors under privatization, by eliminating or preventing barriers to entry of new participants.

- Ensure an adequate distribution of benefits, costs and risks among the public, private and social sectors, avoiding the generation of liabilities for the state and subsidies for the acquirers.

- Favor diversified and plural participation of private parties in the capital of divested enterprises in order to foster investment while preventing monopolistic concentration.

- Seek decentralization in regional rooting of firms, insofar as compatible with their efficient operation.

- Foster competitive and sound production and commercialization practices

- Ensure transparency in divestment procedures.

In addition to these general objectives, certain privatization processes feature specific objectives. On the other hand certain privatization processes took place prior to the establishment of the CID which prevented these goals from being articulated or applied.

7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?

CFC participation takes place in three stages. In the first stage it takes part in designing structural scheme that will be used to privatize a government-owned firm or to grant a concession or permit to enable a privately-run firm to render public services. In this phase, the CFC issues opinions regarding proposed schemes, although final responsibility lies with the sector coordinator.

During the second stage, the CFC participates in preparing legal instruments, including regulatory provisions, tender offer rules and even specific contracts. The Commission's role in this phase also entails issuing opinions and suggestions.

During the third stage, the CFC analyzes, evaluates and issues opinions regarding participation of prospective bidders for concessions or permits. The CFC may issue a favorable opinion, an unfavorable opinion or a conditioned opinion to remedy the particular competition concerns foreseen.

The recent inclusion of section XVI in Article 24 of the LFCE explicitly entitles the CFC to decide on competition promoting measures in privatization processes as well as in the auction proceedings called by government agencies to allocate concessions and permits. Article 51 of the Regulations to the law further establish that the Commission will agree with the entity calling for the auction the basis for the proceeding. In addition, certain sectoral laws require a favorable CFC opinion as a condition for economic agents to participate in concession or license issuing. CFC involvement in other privatization proceedings, however, may not be considered enforcement actions but advocacy activities as no regulations establish an obligation for the regulator to request the CFC's opinion.

In practice, the CFC undertakes an analysis based on the methodology set in the law to review mergers which requires a definition of the relevant market; a determination of whether the allocation would endow the agent with substantial market power; a determination on the existence of entry barriers; as well as a determination on whether the agent would be able to fix prices, control supply or unduly displace competitors.

8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:

- What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?
- To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.

For the first part of the question please refer to the answer to question 7 above. Regarding the second part:

In 2000, the CFC objected to a government plan to privatize 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 privatization 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 privatizing 34 federally-operated airports, which were aggregated into three regional groups for purposes of sale.

In the case of ports the CFC has reviewed the tender processes for the allocation of port terminals to prevent excessive concentration. It thus established a guiding criteria that a

single company may not hold more than one port of each type on the same coastline. 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 privatization 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.

Notices of intent to seek LP gas distribution permits filed before the CFC illustrate problems related to the CFC's lack of legal powers to enforce its decisions. 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.

Finally, privatization of telecommunications illustrates problems stemming from a wrong sequencing of the regulatory reform of this sector. There, a general regulatory structure was not in place until after the privatization (although concession titles contain provisions that address some of the problems of monopoly).

D. General

1. From among the following, how would you characterize your jurisdiction: developed / developing / transitioning? Developing.

2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.

- Prohibition of monopolies and monopolistic practices: Article 28 of the Political Constitution of the United States of Mexico (Constitution)¹⁶

"In the United Mexican States monopolies, monopolistic practices, government monopolies and tax exemptions are prohibited in the terms and conditions dictated by laws...

As a consequence, the law will severely punish, and authorities will effectively prosecute all concentration or hoarding in one or a few hands of basic commodities with the object

¹⁶ The translations offered in this section should not be construed as official translations.

of raising prices; all agreement, process or combination undertaken among producers, industrialists, tradesmen or service entrepreneurs, aimed at preventing free market access or competition among themselves and forcing consumers to pay exaggerated prices and, in general, whatever constitutes an undue exclusive advantage in favor of one or more persons and against the public in general or some social class.

The laws will determine the bases to set maximum prices to articles, inputs of products that are considered necessary for the national economy or of widespread consumption, and will impose the means to organize the distribution of said articles, inputs or products, to avoid unnecessary or excessive intermediation that lead to undersupply, as well as price increases. The law will protect consumers and foster their association to protect their interest.”

- Constitutional exemptions: Article 28 of the Constitution

“The functions exercised exclusively by the State in the following strategic areas shall not constitute monopolies: postal service, telegraphy and radiotelegraphy; petroleum and other hydrocarbons, basic petrochemicals, radioactive minerals and nuclear energy generation; electricity and those activities expressly mentioned in the laws signed by Congress. Satellite communications and railways are priority areas for national development in terms of article 25 of this Constitution; the State will exercise its authority, protect the security and sovereignty of the Nation, and through the granting of concessions or permits, will maintain or establish the ownership of these communication networks in accordance with the laws.

The State shall have those companies and firms required to effectively manage the strategic areas under its responsibility and those priority activities where, according to the laws, it will solely participate or do so with the social and private sectors.

The State shall have a technical and administratively autonomous central bank. Its primary objective will be to ensure stability in the purchasing power of the national monies, strengthening through this the State’s oversight of the nation’s development. No authority may order the Bank to grant financing.

The functions exercised by the state in an exclusive manner, through the central bank in the strategic areas of coin minting and the printing of bills shall not constitute monopolies...

Workers’ associations, created to protect their own interests and cooperative production associations or societies whose aim is to defend their own interests or those of the general interest, who sell national or industrial products directly to foreign markets and represent the main source of wealth in a region or are not basic commodities, on the conditions that the federal government or the states oversees or protects them, and are granted prior authorization from the respective legislatures, shall not constitute monopolies. These same legislatures, by themselves or through a proposal by the Executive may withdraw the authorizations granted for the creation of said associations, when public needs demand it.

The privileges granted for a period of time to authors and artists for the production of their art and those granted to inventors and improvers for the exclusive use of their inventions, are also not considered monopolies.”

- Object of the Law: Article 2 of the Federal Law of Economic Competition (LFCE)

“The object of this law is to protect the process of competition and free market access, through the prevention and elimination of monopolies, monopolistic practices and other restrictions to the efficient functioning of markets for goods and services.

In terms of this law, the word Ministry will be understood to mean Ministry of the Economy and Commission, will be understood as Federal Competition Commission.”

- Scope of the law: Article 3 of the LFCE

“All economic agents are subject to the provisions of this law, whether individuals or corporations, for-profit or not-for-profit, agencies or entities of the federal, state or local administration, associations, chambers of commerce, professional groups, trusts or any other form of participation in economic activities.

Economic agents who have undertaken decisions and those directly involved in conducts deemed illegal by this law will be jointly liable.”

- Exemptions: Articles 4, 5 and 6 of the LFCE

ARTICLE 4:

“For the purposes of this law, the authority exercised exclusively by the state in strategic sectors described in the fourth and seventh paragraphs of Article 28 in the Constitution, do not constitute monopolies.

Nevertheless, the agencies and entities in charge of exercising the authority described in the preceding paragraph, shall be subject to the provisions of this law regarding activities not expressly considered in the assumptions of the referenced constitutional article.”

ARTICLE 5:

“Workers’ associations created according to the corresponding legislation for the protection of their own interests, will not constitute monopolies.

Neither will the privileges granted to authors and artists for the production of their works and those granted to inventors and improvers for the exclusive use of their inventions or improvements, constitute monopolies.

The economic agents referenced in the two previous paragraphs will be subject to the provisions of this law regarding those activities not expressly considered within the protection established under Article 28 of the Constitution.”

ARTICLE 6:

“Associations or cooperatives that directly sell their products abroad, do not constitute monopolies, provided that:

- I. Those products are the region’s main source of wealth or are not basic commodities;*
- II. The products are neither sold nor distributed in Mexico;*
- III. Membership is voluntary and members are free to join or resign membership;*
- IV. They do not grant or distribute permits and authorizations, whose granting corresponds to agencies or entities of the federal public Administration; and*

- V. *Are authorized in each case to incorporate by the corresponding local legislature, according to their place of residence.*

The economic agents referenced in this article will be subject to the provisions of this law regarding those activities not expressly considered within the protection established under Article 28 of the Constitution.”

- Regulated Sectors and effective competition conditions: Articles 7 and 24 of the LFCE

ARTICLE 7:

“In terms of Article 28 in the Constitution, for the setting of prices for goods and services that are necessary for the nation’s economy or for basic consumption, the following shall apply:

- I. *It is the Federal Executive’s exclusive charge to determine by decree those goods and services that may be subject to price controls, as long as there is an absence of effective competition conditions in the relevant market. The Commission will determine through a declaration whether these conditions are indeed absent.*
- II. *The Ministry, absent prejudice regarding the attributions of other agencies and previously requesting the opinion of the Commission, shall fix prices for the corresponding goods and services according to the previous paragraph, and based on criteria that avoid supply shortages.*

The Ministry may agree or coordinate with producers or distributors the necessary actions or mechanisms, attempting to minimize the effects on competition and free market access.

The Federal Consumer Protection Agency, under the coordination of the Ministry, will be responsible of inspecting, overseeing and applying remedies, regarding the prices determined in accordance with this article, following the guidelines foreseen in the Federal Consumer Protection Law.”

ARTICLE 24:

“The Commission shall have the following attributions:

...

- V. *Resolve on competition conditions, effective competition, the existence of substantial market power in the relevant market or other issues related with the process of competition and free market access that are referenced in this or other laws, rulings or administrative dispositions.*
- VI. *Issue, when it considers it appropriate or in response to a petition, a binding opinion in matters of economic competition to the agencies and entities of the federal public administration, regarding adjustments to programs and policies when these may have negative effects on the process of competition and free market access, in accordance with applicable legal statutes. The Head of the Federal Executive Power may object this opinion. The opinion and, if applicable, the objection must be published;*

- VII. *When it considers it appropriate or in response to a petition, issue an opinion about bills for laws, regulations and decrees in issues relating with competition and free market access, without these opinions having a binding nature. The referenced opinions must be published.*
- VIII. *Issue, when it considers it appropriate or in response to a petition, a binding opinion in matters of economic competition, to the agencies or entities of the federal public administration regarding bills for dispositions, rules, agreements, directives and other administrative acts of a general nature intended for release, when these may have negative effects on the process of competition and free market access. The Head of the Federal Executive Power may object this opinion. The opinion and, if applicable, the objection must be published;*
- IX. ...
- X. *Issue, when it considers it appropriate, an opinion in matters of competition and free market access, regarding laws, rulings, agreements, directives and administrative acts of a general nature; the referenced opinions must be published.*
- XI. *When it considers it appropriate, issue an opinion in matters of competition and free market access, regarding laws, rulings, agreements, directives and administrative acts, without these opinions having legal effects and without the Commission being forced to issue an opinion;*
- XII. ...
- XIII. ...
- XIV. ...
- XV. ...
- XVI. *In matters of competition policy, resolve on the inclusion of protective and promotion measures for the divestment of public assets and entities, as well as in the process of assigning concessions and permits undertaken by agencies and entities of the federal public administration, in the cases determined by the code of rulings of this law;... ”*

- Unilateral Conducts: Article 10, 11, 12 (excerpt) and 13 (excerpt) of the LFCE

ARTICLE 10:

“Subject to proving the assumptions referenced under articles 11, 12 and 13 of this Law, relative monopolistic practices are deemed to be those acts, contracts, agreements, processes or combinations, whose object to effect is or may be to unduly displace other agents from the market, substantially impede their access, or establish exclusive advantages in favor of one or more persons, in the following cases:

- I. *Among economic agents that are not competitors amongst themselves, the fixing, imposition or establishment of exclusive marketing or distribution of goods or services, by reason of condition, geographic situation or for predetermined periods, included the dividing, distributing or assigning of clients or suppliers; as well as imposing the obligation of not manufacturing*

or distributing goods or services for a predetermined or to be determined timeframe;

- II. *The imposition of price or other conditions that a distributor or supplier should follow when marketing or distributing goods or when providing services;*
- III. *The sales or transaction conditioned to the purchase, acquisition, sale or offer of an additional good or service, normally distinct or distinguishable, or on the basis of reciprocity;*
- IV. *The sales, purchase or transaction subject to the condition of not using, acquiring or selling, marketing or offering goods and services produced, processed, distributed or marketed by a third party;*
- V. *The unilateral action consisting of a refusal to sell, market or offer to persons determined goods or services available or normally offered to third parties;*
- VI. *The concerted action among various economic agents or the invitation to them to exercise pressure against some economic agent or to refuse to sell market, or acquire goods and services from this economic agent with the purpose of dissuading him from a determined conduct, punishing or otherwise forcing him to act in a certain way;*
- VII. *Systematic sales of goods or services at prices below their average total cost or their occasional sale below the average variable cost, when there are elements to presume that losses incurred will be recouped through future price increases, in the terms established by the rulings of this law.*

When the goods or services in question are jointly produced or divisible for their marketing, the average total cost and average variable cost will be distributed among all the subproducts or co-products, in the terms established by the rulings of this law.

- VIII. *The granting of discounts by producers or suppliers to purchasers with the requirement of exclusivity in the distribution or marketing of the products or services, when such cannot be justified in terms of efficiency;*
- IX. *The persistent use of profits that an economic agent obtains from the sale of a good or service for financing losses on another good or service;*
- X. *The establishment of different prices or conditions of sale for different purchasers situated in equality of conditions, or*
- XI. *The action of one or several economic agents, the object or effect of which is or may be, directly or indirectly, to increase costs for their competitors, or to impede their productive process or reduce demand.*

To determine whether the practices referenced in this article should be remedied in terms of this law, the Commission will analyze efficiency gains claimed by the economic agents as arising from the conduct and whose overall effect is favorable to the process of competition and free market access. These efficiency gains may include the following: the introduction of new products; the use of production leftovers or byproducts, or of defective or perishable products; reductions in costs that arise from applying new

techniques and methods of production, the merging of assets, increases in the scale of production and the production of different goods or services with the same factors of production; the introduction of new technological advances that result in the production of new or improved goods or services; the combination of productive assets or investments and their recovery through improvements in quality or increases in attributes for goods and services, improvements in quality, investments and their return, timeliness and service, whose incidence over the distribution channel is favorable; that these do not result in significant price increases, or a significant reduction in the choices available to the consumer, or a similar reduction in the degree of innovation in the relevant market; as well as others that demonstrate that net improvements to consumer welfare arising from these practices exceed their anticompetitive effects.”

ARTICLE 11:

“For the practices relayed in the previous article to be deemed illegal, the following conditions have to be proven:

- I. That the allegedly responsible agent has substantial market power in the relevant market;*
- II. That they are undertaken over goods or services that correspond to the relevant market.”*

ARTICLE 12: Establishes the criteria employed to determine the relevant market.

ARTICLE 13: Establishes the criteria employed to determine when an economic agent has substantial market power in the relevant market.

- Efficiencies: article 6 of the current code of rulings to the LFCE.

“Economic agents may accredit before the Commission whether the gains in efficiency deriving from a relative monopoly practice have a favorable influence on the process of competition and free market access, these must be taken into consideration in the evaluation of the conduct referenced under Article 10 of the Law.

Gains in efficiency are deemed to include the following, among others:

- I. The obtaining resource savings that allow the allegedly responsible agent to produce the same quantity of the good at a lower cost, or a greater quantity of the good at the same cost, on a permanent basis;*
- II. The obtaining of lower costs if two or more goods or services are produced jointly as opposed to separately;*
- III. A significant reduction in administrative costs;*
- IV. The transfer of production technology or market know-how, and*
- V. A lowering of production or marketing costs arising from the expansion of an infrastructure or distribution network.”*