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Discussion Topic

Who defines conditions of effective competition, Banco de Mexico or the Federal Competition Commission or both? (May 2009)

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This Note is a personal opinion. It does not necessarily represent VA&BA position.

0. Recent legislation on Banco de Mexico regulatory powers seems to break down the “monopoly power” of the Federal Competition Commission to assess conditions of effective competition in a relevant market.
1. The Chamber of Representatives is studying modifications to several laws on financial institutions as already approved by the Senate. Some of those modifications empower the Central Bank, Banco de Mexico, to evaluate and declare the existence or lack thereof of effective competition in a given financial relevant market in order to apply regulatory measures aimed, for instance, to cap interest rates.

The Senate’s proposal sent to the Chamber of Representatives can be consulted in: Senate, Gazette of Parliament, Num. 367, Thursday 16, April 2009, at <http://www.senado.gob.mx/gace.php?sesion=2009/04/16/1&documento=22>

Herein below an unofficial translation of this latter document is presented (our own underlining).

Reforms to the Law for Transparency and Ordering of Financial Services (LTOFS) include:

Article 4.- Pursuant to article 1 of this Law, Banco de Mexico shall issue general criteria to regulate lending and borrowing interest rates, Fees and anticipated and before due payments of transactions with their Clients, credit institutions, financial societies of limited object and regulated financial societies of multiple object, as well as to regulate interchange fees regarding Entities.

Pursuant to endowed powers by this article, Banco de Mexico will regulate Fees and interest rates, as well as any other charge of transactions celebrated by Financial Entities with Clients. To apply such powers Banco de Mexico may request an opinion by the National Commission on Banking and Securities, by the National Commission to Protect and Defend Users of Financial Services or by the Federal Competition Commission.

*The National Commission to Protect and Defend Users of Financial Services, the National Commission on Banking and Securities, the Secretariat of Treasury and Public Credit, credit institutions, financial societies of limited object or regulated financial societies of multiple object, may request **Banco de Mexico to evaluate** if there are or there are not **reasonable competition conditions**, regarding lending and borrowing transactions and services of mentioned entities.*

*To this effect Banco de Mexico may also act ex officio and **may request an opinion** by the Federal Competition Commission so that this latter, in a term no less than thirty days and no later than sixty calendar days after the request, pursuant to its applicable Law, determines among other aspects, whether **there is or there is not effective competition** and the corresponding relevant markets.*

Based on such entity's opinion, Banco de Mexico, as the case may be, shall take corresponding regulatory measures, which will be in force as long as originating conditions prevail. Regulatory measures by Banco de Mexico will establish bases to determine such Fees and Interest Rates, as well as adjustment mechanisms and duration terms.

*Banco de México or entities subject to such regulation **may request** the Federal Competition Commission an opinion concerning the prevalence of conditions on which regulation was based.*

Reforms to the Law of Banco de Mexico establish among others:

Article 26.

*Banco de Mexico will regulate fees and interest rates as well as any other charge for transactions celebrated by financial entities with clients. To this effect Banco de Mexico **may request an opinion** by the National Commission on Banking and Securities, by the National Commission to Protect and Defend Users of Financial Services or by the Federal Competition Commission and will observe to these effects what is stated in the Law for Transparency and Ordering of Financial Services.*

2. So far only the Federal Competition Commission (FCC) had the legal standing to delimit a relevant market and to assess whether in such a market there are conditions of effective or reasonable competition. (See Article 33 bis, Federal Law of Economic Competition (FLEC). **June 28, 2006.**)

The word **“may”** in the financial reforms seems to entitle Banco de Mexico to decide whether to make an analysis of its own without third's opinions. I have been advised that according to some legal criteria there may be circumstances whereby wording implies an actual obligation by the authority to request an opinion. However as noted one of the modifications is aimed to use the word “may” instead

of the present “should” (see paragraph four of the proposed reforms to article 4 in LTOSF above).

In any case the proposed reforms do not contain an indication whereby if an opinion is requested, such opinion should be binding.

One must notice though that the new empowerment to Banco de Mexico does not cancel out any similar capacity actually granted to the FCC. Incidentally, the FCC’s procedure for these issues might as well take over a year, so the sixty calendar days stated in proposed article 4 as quoted in paragraph 1 above seems rather impractical.

3. The wording of reforms quoted above in paragraph 1 could be interpreted as giving Banco de Mexico the capacity **to define by itself** a relevant market and to assess if therein prevail conditions of effective competition. This interpretation would be consistent with a criterion set by the Supreme Court (SC) whereby this institution declared non-constitutional some reforms to the Federal Law of Telecommunications and to the Federal Law of Radio and Television. See SC: “Acción de Inconstitucionalidad 26/2006, **June 7, 2006**, at http://www.scjn.gob.mx/NR/rdonlyres/B111A888-9772-4304-8419-0F461419ED81/0/AI_26_2006_PL.pdf
4. SC’s analysis calling upon a former resolution of its own, decision number CVII/2000, states:

As can be seen [resolution CVII/2000 quoted previously] this Supreme Court has already made a pronouncement on the concept of “relevant market” and “substantial power” so that there is no obstacle for diverse authorities to determine and apply on such matter or cases related to their legal competences, as long as they are delimited by what is stated by the special law on the matter, that is the Federal Law of Economic Competition. (p. 211)

5. It is worth noticing that financial reforms like some other enacted legislation (eg. Lp gas regulations) call for public criteria by the FCC as to defining general economic and legal parameters for a workable concept of reasonable or effective competition. Nowadays the only situation well defined by the FLEC is the identification of a relevant market (FLEC’s article 12) with or without the presence of an economic agent with substantial power (FLEC’s articles 13 and 17).
