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More on antitrust damages and Competition Law

Discussion Topic

By Alvaro R. Sánchez G.

This Note is personal. It does not necessarily reflect VA&BA position

1. The Federal Law on Economic Competition (FLEC) states:

*“Article 36. To determine penalties the Commission should take into account infringement’s gravity, **caused damage**, signs of intentionality, defendant’s market share; size of the affected market; duration of the conduct or concentration and defendant’s recidivism or previous conducts as well as its economic strength.” (Emphasis added.)*

2. Some recent decisions of the Federal Competition Commission (FCC) wherein penalties have been imposed for antitrust infringements illustrate that the monetary amount of the sanction is arrived at following due discussion of each one of the elements comprised in FLEC’s Article 36.¹
3. Out of FCC’s public documents one cannot identify if the authority carried out a **quantitative** assessment of the “caused damage” as we can only read **qualitative** considerations.
4. In the forum “**Mexico before the crisis: What to do for achieving growth?**” the FCC’s head advocated for a rise in legal penalties.²

¹ For further reference regarding each one of such elements please consult the following public documents of the FCC:

http://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/denuncia/DE-21-2003.pdfhttp://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/denuncia/DE-11-2005.pdf
http://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/Investigaciones%20de%20oficio/Resolucion%20publicaIO-01-2005.pdf
[http://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/Investigaciones%20de%20oficio/IO-01-2006_\(CAAAREM\)%20versión%20pública_XAP.pdf](http://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/Investigaciones%20de%20oficio/IO-01-2006_(CAAAREM)%20versión%20pública_XAP.pdf)

² This rise in legal penalties is one of the three elements that, according the FCC’s head would provide further strength to the FCC.

See: “*Transcripción de la tercera sesión del foro México ante la crisis: ¿Qué hacer para crecer?, convocado por el Honorable Congreso de la Unión, LX Legislatura llevado a cabo hoy lunes en el auditorio del edificio E.*” Palacio Legislativo de San Lázaro, 9 de febrero de 2009. Page 80.

Available at:

<http://www.senado.gob.mx/content/sp/compare/comunica/esteno3.pdf>

5. Whether penalties remain as stated or the FLEC is amended so to increase them, FCC's Guidelines on the **methodology to quantify** the "caused damage" are needed.
6. Penalty Guidelines will offer transparency and support to authority's decisions. They will certainly be useful for anyone interested or involved in an actual case.

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