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Big Cola v. Coca-Cola: How A Convenient Store Owner's Complaint Resulted in One of Mexico's Largest Antitrust Fines

Travis Bennion Olsen

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I. INTRODUCTION

"Since the 1857 Constitution [of Mexico], an individual right against monopolies, estancos and monopolistic practices has been established, consecrating a right of all Mexicans to participate freely in the market."¹

Long before the Sherman or Clayton Acts were passed in the United States, the Mexican government sought to promote economic freedom through the prohibition of anticompetitive acts and concentrated markets.² This was done in large part as a result of years of limited economic access for the indigenous Mexican peo-

1. Fernando Sánchez Ugarte, *Diez Años de Política de Competencia* [Ten Years of Competition Policy], *La Primera Década de la CFC*, 27, 36 (2003). *See also* Constitución Política de los Estados Unidos Mexicanos [Const. 1857], art. 28, *Diario Oficial de la Federación* [DO], 5 de Febrero de 1857 (Mex.).

2. Constitución Política de los Estados Unidos Mexicanos [Const. 1857], art. 28, *Diario Oficial de la Federación* [DO], 5 de Febrero de 1857 (Mex.).

ple.³ This anti-monopolistic ideology continued after the Revolution in 1910 and was preserved in the new Constitution of 1917.⁴ The country's first antitrust statute, the Monopoly Law, was passed in 1934.⁵ Unfortunately this law was never enforced and the constitutional rights were not protected.⁶

After a time of economic instability, the government dramatically shifted its stance, resulting in a thorough economic restructuring.⁷ This was executed by privatizing government-owned enterprises, creating and encouraging a climate of foreign direct investment, and positioning itself on the world trading scene.⁸ This policy change culminated in Mexico's accession to the General Agreement on Tariffs and Trade (GATT) in 1986 and the signing of the North America Free Trade Agreement (NAFTA).⁹

Through NAFTA, Mexico consented to "adopt or maintain measures to proscribe anti-competitive business conduct, and . . . take appropriate action with respect thereof."¹⁰ The Monopoly Law of 1934 was "outdated and unenforced" and would not bring Mexico into compliance with its NAFTA obligations.¹¹ Therefore, the Mexican Congress passed the Federal Law of Economic Competition, *Ley Federal de Competencia Económica* ("LFCE" for the Spanish acronym), in 1992.¹² The new law, which was patterned after that of the United States,¹³ was seen as a "means of conceptualizing the antitrust policy as an instrument to promote competition through a series of legal provisions which allow challenging monopolistic practices, prevent and penalize concentrations in

3. Ugarte, *supra* note 1.

4. Constitución Política de los Estado Unidos Mexicanos [C.P.], *as amended*, art. 28, Diario Oficial de la Federación [DO], 5 de Febrero de 1917.

5. Ley Organica del Artículo 28 Constitucional en Material de Monopolios, [Monopoly Law], Diario Oficial de la Federación [DO], 31 de Augusto de 1934 (Mex.). See also Sergio García-Rodríguez, *Mexico's Institutional Framework for Antitrust Enforcement*, 44 DEPAUL L. REV. 1149, 1158 (1995).

6. García-Rodríguez, *supra* note 5, at 1158.

7. *Id.* at 1154.

8. *Id.*

9. *Id.*

10. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 365 (1993).

11. Joshua A. Newburg, *Mexico's New Economic Competition Law: Toward the Development of a Mexican Law of Antitrust*, 31 COLUM. J. TRANSNAT'L L. 587, 588 (1994).

12. Ley Federal de Competencia Económica [LFCE][Antitrust Law], *as amended*, Diario Oficial de la Federación [DO], 24 de Diciembre de 1992 (Mex.).

13. See Sherman Antitrust Act, ch. 647, § 2, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 2 (2004)); see also Clayton Antitrust Act, ch. 323, § 2, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 13 (1936)).

restraint of trade, and enhancing a general legal framework which eliminates restrictions to the efficient operation of markets, among other actions.”¹⁴

In addition to revising the competition law, an enforcement mechanism to prosecute anticompetitive practices, the Federal Competition Commission, *Comisión Federal de Competencia* (“CFC” for the Spanish acronym), was established.¹⁵ The CFC is governed by five Commissioners, one of which is designated as the Commission’s President.¹⁶ Its mission entails “prevent[ing], investigat[ing] and combat[ing] monopolies, monopolistic practices and mergers.”¹⁷

Even though the LFCE is a similar statute to the Sherman and Clayton Acts in the United States, the CFC’s interpretation results in a different outcome than would result in the United States for a similar anticompetitive act. This article details one particular CFC case, *Big Cola v. Coca-Cola*,¹⁸ which demonstrates the Commission’s analysis in terms of exclusive dealing contracts, refusal to deal arrangements, and vertical price restraints. This case was initiated by a convenient store owner who filed a complaint with the CFC and subsequently resulted in one of the largest antitrust fines in Mexico’s history.¹⁹ However, liability would likely have not been found had the acts occurred in the United States.

This article will explain Mexico’s competition law and enforcement mechanism and will narrate the *Big Cola v. Coca-Cola* decision with particular attention to the Commission’s analysis of product market definition, geographic market definition, market power, and the determination of punishment. The article will then compare the Commission’s findings to the liability analysis employed in the United States.

14. Rafael Valdes-Abascal, *Concentrations an Analysis of the Mexican Economic Competition Legal Framework Relevant Cases*, 9 U.S.-Mex. L.J. 57 (2001).

15. García-Rodríguez, *supra* note 5, at 1163.

16. LFCE, art. 25 (Mex.).

17. *Id.* at art. 24.

18. Pleno de la Comisión Federal de Competencia [CFC] [Federal Competition Commission], Propimex, S.A. de C.V. y Otros, Junio de 2005, DE-021-2003, Página 1 (Mex.).

19. James Hider, *Woman Who Flattened Coca-Cola*, TIMES, Nov. 18, 2005, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article591379.ece. See Sinca Imbursa, S.A. de C.V. y Otros, IO-002-2006, The Coca-Cola Company y Otros, DE-006-2000 (Mex.).

II. THE LAW

The LFCE divides anti-competitive practices into two categories, absolute and relative monopolistic practices. Absolute, similar to "per se" in the U.S., bars price-fixing, bid-rigging, the dividing of markets, and establishing an obligation limiting the amount of goods sold.²⁰ Relative monopolistic practices include tying and refusal to deal agreements, exclusive dealing contracts, vertical price and non-price maintenance, boycotts, and as a catch-all, any act that would impede competition.²¹

III. THE COMMISSION

The CFC is an administrative agency empowered to investi-

20. LFCE, art. 9 (Mex.). ("Absolute monopolistic practices are contracts, agreements, arrangements, or combinations among competitive economic agents, whose aim or effect are any of the following: I. [t]o fix, raise, to agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets, or to exchange information with the same aim or effect; II. [t]o establish the obligation to produce, process, distribute or market only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services; III. [t]o divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, by means of a determinable group of customers, suppliers, time or spaces; or IV. [t]o establish, agree upon or coordinate bids or to abstain from bids, tenders, public auctions or bidding."). Note that the LFCE has been amended since the *Big Cola* case was decided. All citations in this article refer to the previous version which was used in the analysis of that decision.

21. *Id.* at art. 10. ("Relative monopolistic practices are deemed to be those acts, contracts, agreements or combinations, which aim or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favor of one or several entities or individuals, in the following cases: I. [s]ome of the economic agents that do not compete among themselves are: to set, impose or establish the exclusive distribution of goods and services, by means of the subject, geographical location, or specific periods of time, including the division, distribution or assignment of customers and suppliers; and also the obligation to not manufacture or distribute goods or services for a specific period of time or that may be specified; II. [t]o set the prices or other conditions that a distributor or supplier has to abide by when marketing or distributing goods or providing services; III. [t]he conditioned sale or transaction when buying, acquiring, marketing or providing other goods or additional services, normally different or that can be differentiated, or on the basis of reciprocity; IV. [t]he sale or transaction subject to the condition of not using or acquiring, marketing or providing goods or services produced, processed or distributed or sold by a third party; V. [t]he unilateral action based on refusing to sell or provide to specific individuals, goods or services available and normally offered to third parties; VI. [t]he agreement reached among several economic agents or the invitation extended them to exert pressure against customers or suppliers, in order to discourage them from specific behaviors, to apply retaliations or force them to act in a specific manner; or VII. [i]n general, all the actions that unduly damage or impair the process of competition and free access to production, processing, distribution and marketing of goods and services.")

gate, determine guilt, and impose penalties for all anticompetitive practices.²² CFC investigations can be initiated by a private party who files a complaint with the agency or can originate with the Commission itself.²³ For absolute or per se violations, any person or entity may file a complaint with the CFC, but if the act is only a relative monopolistic practice, then the complainant must have suffered actual or potential damage.²⁴

A private party must file its complaint with the Commission and the CFC; there is not a right to a private civil suit. The Commission has the power to determine guilt and impose punishment; the courts are excluded from competition-related rulings in regards to a constitutional challenge.²⁵ In fact, if a party feels that the CFC erred in its analysis or interpretation of the law, the party may only file an appeal with the Commission itself to “revoke, amend, modify, or confirm” its own ruling.²⁶ As a result, the CFC enjoys broader enforcement power than any other administrative entity in Mexico.²⁷

In its brief history, the CFC has utilized its distinctive authority to end anticompetitive practices, break-up cartels, preclude concentrated mergers, and impose fines on the offenders. From its inception in 1993 through 2007, the Commission has ruled on 870 decisions on anticompetitive practices and 3,149 decisions on mergers.²⁸ In 2009 alone, the CFC imposed a total of 409,663,327 Mexican pesos, approximately USD 31,850,175.²⁹

22. *Id.* at art. 24. (“The Commission shall have the following powers: 1.) to investigate competition law offenses, at the request of a private party or on its own initiative; 2.) to resolve administrative cases in the area of competition law, impose administrative penalties and refer criminal business to the Attorney General; 3.) to issue advisory opinions upon request by the Executive Branch regarding Competition Law implication of draft laws and regulation; 4.) to issue legal opinions, on its own initiative, regarding competition and free market access issues; and 5.) to participate in the negotiation and execution of international competition policy, treaties and agreements.”).

23. *Id.* at art. 30.

24. *Id.* at art. 32.

25. García-Rodríguez, *supra* note 5, at 1175-76.

26. LFCE, art. 39 (Mex.). Despite the appearance of a possible conflict of interest, the Commission has overturned its own decisions. See RA-26-2006 (decision overturned based on an incorrect relevant market definition of alcoholic beverages); RA-36-2001 (decision overturned based on an incorrect relevant market definition of telephone services).

27. García-Rodríguez, *supra* note 5, at 1164.

28. *Informe Annual*, Comisión Federal de Competencia [CFC] 88 (2009) (Mex.).

29. *Id.* at 91. U.S. Dollar amount based on currency rate of 12.8622 in December 2009. See *Foreign Exchange Rates*, FEDERAL RESERVE STATISTICAL RELEASE (Jan. 4, 2010), <http://www.federalreserve.gov/releases/G5/20100104/>.

IV. *BIG COLA V. COCA-COLA*A. *Background*

In 2001, Mexico had a per capita soda consumption rate of 149.9 liters annually, the second highest in the world behind the United States.³⁰ “Practically every family consumes [soda] which is perhaps why it’s considered basic [to daily life].”³¹ This industry also represented 10.5 percent of the Gross Domestic Product division of food, drink, and tobacco, and 0.6 percent of the national GDP.³²

Specifically, to illustrate the prominence of Coca-Cola in Mexico – in the community of Mitzitón, in the state of Chiapas, the local council and only store were run by the same man, José Santíz. “The Coca-Cola Company gave him a refrigerator, chairs, tables, and other gifts in exchange for selling a minimum amount of soda each month. Santíz, in turn, forced other members of the council to raise the money to buy eight or nine cases of Coke from him each month; otherwise, he said, he would close the much-needed store.”³³

The strength and influence of this industry was noticed by a Peruvian company, Ajemex, which introduced its soda, Big Cola, to Mexico in 2002. Within two years of its entry, Big Cola had gained five percent of the market and had a presence in twenty-six of the thirty-two states of Mexico with thirty-one distribution centers.³⁴ Coca-Cola was aware of this change in consumer preference as evidenced by its subsequent actions. In 2003, a convenient store owner, Raquel Chavez, of the Iztapalapa area of Mexico City, was approached by her Coca-Cola distributors and asked not to sell Big Cola anymore.³⁵ She refused. Chavez stated, “I always told them ‘no’. I knew that Mexico was a free country and I was free and that in my shop I’m the boss.”³⁶

Unfortunately, the deliveries to her store of Coca-Cola stopped and her revenue declined. “If a store doesn’t sell Coca-

30. Karla Torrijos, *La Chispa de la Competencia*, LA JORNADA, May 31, 2004, <http://www.jornada.unam.mx/2004/05/31/008n1sec.html>.

31. Angeles Cruz Martinez, *Los Mexicanos Consumen 146 Litros de Refresco al Año, en Promedio*, LA JORNADA, Dec. 17, 2006, <http://www.jornada.unam.mx/2006/12/17/index.php?section=sociedad&article=037n1soc>.

32. Torrijos, *supra* note 30.

33. Beverly Bell, *Cola Wars in Mexico*, IN THESE TIMES, Oct. 6, 2006, *available at* <http://www.inthesetimes.com/article/2840>.

34. *Id.*

35. Hider, *supra* note 19.

36. *Id.*

Cola, it's condemned to failure, to ruin. That's why Coca-Cola has been able to dominate everyone."³⁷ When she complained she was told, "We can do whatever we want. Coca-[C]ola has so many lawyers and so much money that no one can do anything to it."³⁸ Not wanting to give in to Coca-Cola's demands, Chavez began buying Coca-[C]ola from other retailers and used her own car to deliver the goods to her store.³⁹ This was not a very viable or profitable option, so on May 12, 2003, she filed a complaint with the CFC alleging anticompetitive practices by Coca-Cola in refusing to sell their product to her unless she stopped selling a rival's product.⁴⁰ The Commission launched an investigation on June 5, 2003, and in August, Ajemex filed to join the complaint.⁴¹ The Commission investigated several potential defendants and heard pretrial motions.⁴² On March 28, 2005, the CFC issued its tentative findings of liability and requested that twenty-one entities within the Coca-Cola system submit their arguments in defense of the proposed violations.⁴³ On June 30, 2005, the CFC rendered its final decision regarding the allegations.⁴⁴

B. The Investigation

Ajemex complained that the entire Coca-Cola system violated the law by placing restrictions on retail stores prohibiting the sale of Big Cola, by refusing to sell Coca-Cola products to those that did not comply and by awarding promotions for those who did comply.⁴⁵ Ajemex submitted to the Commission the results of interviews it conducted with 184 retail stores in ten metropolitan areas where it operates.⁴⁶ The results showed 178 were under a condition to not sell Big Cola, 168 would have promotions taken away if they sold Big Cola, 116 would have a refrigerator taken away if they sold Big Cola, 62 sold Big Cola but did not display it, 52 exchanged Big Cola for Coca-Cola, 31 had exclusive dealings

37. *Id.*

38. *Id.*

39. *Id.*

40. Pleno de la Comisión Federal de Competencia [CFC] [Federal Competition Commission], Propimex, S.A. de C.V. y Otros, Junio de 2005, DE-021-2003, Página 1 (Mex.).

41. *Id.* at 1-2.

42. *Id.* at 3-28.

43. *Id.* at 27.

44. *Id.* at 28.

45. *Id.* at 55-56.

46. *Id.* at 58 (stating that the metropolitan areas consist of Mexico City, Acapulco, Guadalajara, Merida, Oaxaca, Puebla, Quentaro, Veracruz, Jalapa, and Leon).

contracts with Coca-Cola, and 12 had Big Cola advertisements destroyed.⁴⁷

At one store in Mexico City, which sells almost every brand of soda, Coca-Cola not only threatened to take away promotions, but went one step further by exchanging one package of Big Cola from the store with two packages of Coca-Cola from the distributor.⁴⁸ Distributors even removed twist-off bottle caps of Big Cola and poured the soda down the drain so that their rival's product could not be sold.⁴⁹ Another store in Queretaro signed an exclusive dealing contract with Coca-Cola through which the store would receive a twenty percent discount and have its building painted for free if it would only sell Coca-Cola products.⁵⁰

Each of the acts complained of were committed by various entities, but each under the name of Coca-Cola. Therefore, before analyzing the legality of those actions, the Commission defined the Coca-Cola network system in Mexico and the responsibility each held. The Coca-Cola Company (TCCC) is headquartered in Atlanta and uses the Coca-Cola Export Company (TCCEC) to market its product outside of the United States.⁵¹ TCCEC "develops and carries out the commercial procedures for the sale of [Coca-Cola Products]" and "collaborates with different bottlers of TCCC brand products in making the plans of and supporting marketing and publicity . . . and carrying out the bottling, distribution and sale of the final product."⁵² These exclusive bottlers receive a license from TCCEC to work within a previously determined geographic area and are given the responsibility to promote sales with individual retailers.⁵³ The bottlers and their subsidiaries maintain contacts with the clients, establish prices, and ensure that contracts with retailers are maintained.⁵⁴ They work under contracts with TCCC through the authorization of TCCEC, who directs marketing and publicity.⁵⁵

The Commission determined that the bottlers are legally responsible for the actions of their subsidiaries because of their

47. *Id.* at 59.

48. *Id.* at 103.

49. *Id.*

50. *Id.* at 104.

51. *Id.* at 30. See also *Anniversary of an Icon*, THE COCA-COLA COMPANY, http://www.thecoca-colacompany.com/presscenter/presskit_contour_bottle_time_line.html.

52. See *Propimex*, DE-21-2003.

53. *Id.*

54. *Id.* at 31.

55. *Id.* at 51.

parent-child relationship.⁵⁶ The Commission also found TCCEC to be legally responsible for the actions of the bottlers, and thereby the subsidiaries, because of its involvement in marketing, publicity, and familiarity with the workings of the bottlers.⁵⁷ In all, twenty-two entities within the Coca-Cola system, including TCCEC, *could* be found liable if the actions complained of were determined to be violations of the LFCE.⁵⁸

C. *The Law*

Article 10 of the LFCE considers “the sale, purchase or transaction subject to a condition to not use, acquire, sell, market, or provide goods or services . . . to a third party” and “unilateral action consisting in refusing to sell, market, or provide to specified persons goods or service available and normally offered to third parties” as relative monopolistic practices.⁵⁹ The CFC determined that parts of the Coca-Cola system had engaged in “1.) the sale or transaction under the condition to not use or acquire, sell or proportion the goods or services produced, processed, distributed or market to a third party, in this case the brands of soda Big Cola, Mega Big, Doble Big and First, all of whom are produced and distributed by Ajemex, and 2.) the unilateral action consisting in refusing to sell or proportion to specific people goods or services available and normally offered to third parties with the purpose of restricting the supply of Ajemex products and the establishing of the products of brands Big Cola, Mega Big, Doble Big and First” in violation of Article 10 of the LFCE.⁶⁰ These actions can be characterized as exclusive dealing contracts and refusal to deal arrangements.

To determine whether these specific anticompetitive acts result in liability requires “a case-by-case analysis rather than a

56. *Id.* at 31-51.

57. *Id.* at 51-52.

58. *Id.* (listing the entities as TCCEC, Coca Cola Femsa, Propimex, Refrescos y Aguas Minerales, Inmuebles del Golfo, Panamco Bajío, Panamco Golfo, Grupo Continental, Embotelladora La Favorita, Embotelladora Zapopan, Yoli de Acapulco, Agua de Taxco Yoli, Fomento Queretano, Embotelladora La Victoria, Refrescos Victoria del Centro, Embotelladora de San Juan, Administración Peninsular Corporativa, Industria Refrésquela Peninsular, Industria Embotelladora de Campeche, Embotelladora del Caribe, and Embotelladora Peninsular).

59. *See generally* Ley Federal de Competencia Económica [LFCE] [Antitrust Law], *as amended*, Diario Oficial de la Federación [DO], 24 de Diciembre de 1992 (Mex.).

60. *Propimex*, DE-021-2003 at 104.

draconian or inflexible presumption.”⁶¹ The statutory requirement for a finding of liability is that the offending party holds “substantial power in the relevant market and that they are carried out regarding the goods or services corresponding to that relevant market.”⁶² To determine the relevant market “the Commission shall identify the goods or services which make up the relevant market . . . those that may be substituted for them . . . [and] shall define the geographic area in which the said goods or services are supplied or in demand, and within which the option exists to go without distinction to suppliers and customers without incurring appreciably different costs.”⁶³ The CFC will specifically consider the substitutability of goods considering technological issues, distribution costs of the goods and its possible substitutes, the cost and access to other markets, and any government standards that may restrict access to alternatives.⁶⁴

Overall substantial power is determined by the standing of the goods in the relevant market, the lack of imports, and the high cost for consumers if suppliers were switched.⁶⁵ Specifically, the Commission examines market share, barriers to entry, existence and power of competitors, competitors’ access to input sources, the firm’s recent behavior, and any other criteria established by law.⁶⁶ Market share is determined by “sales indicators, the number of customers, productive capacity and any other factor the Commis-

61. Gabriel Castaneda Gallardo, *Antitrust Enforcement in Mexico 1993-1995 and Its Prospects*, 4. U.S.-MEX. L.J. 19, 23 (1996).

62. LFCE, art. 11 (Mex.).

63. Reglamento de la Ley Federal de Competencia Económica [RLFCE] [Federal Regulation of Economic Competition], art. 9, Diario Oficial de la Federación [DO], 4 de Marzo de 1998 (Mex.). (“For the effects of Article 12 of the Law, the Commission shall identify the goods or services which make up the relevant market, whether produced, marketed or supplied by the economic agents, and those that are or may be substituted for them, whether domestic or foreign, as well as the time required for such substitution to take place. Subsequently the Commission shall define the geographic area in which the said goods or services are supplied or in demand, and within which the option exists to go without distinction to suppliers and customers without incurring appreciably different costs; the Commission shall also take into consideration the cost of distributing the said good or service, and the cost and the probabilities of access to alternative markets. Likewise, those economic and normative restrictions of a local, federal or international nature which prevent access to the said substitute goods or services, or which prevent the access of users or consumers to alternative sources of supply, or the access of the suppliers to alternative customers, shall be considered.”). Note that the RLFCE has been amended since the *Big Cola* case was decided. All citations in this article refer to the previous version which was used in the analysis of that decision.

64. LFCE, art. 12 (Mex.).

65. RLFCE, art. 13 (Mex.).

66. LFCE, art. 13 (Mex.).

sion deems appropriate.”⁶⁷ Barriers to entry into the market contribute to a firm’s market power in that market. The Regulations define barriers to entry as financial costs to developing alternative channels of distribution, the amount and period of recoupment for investment, government authorization, investment for advertising, limitation on competition from international markets, restrictions based on common practice in the market, and government discrimination of incentives or assistance.⁶⁸

D. The Commission’s Analysis

1. Product Market Definition

To define the relevant product market, the CFC analyzed possible substitutes of carbonated sodas to determine whether “those products would satisfy the identical needs of the consumer and whether he or she could opt for those products with similar conditions of price, quality and opportunity.”⁶⁹

Carbonated drinks are sold in two types of containers: open and closed. Open containers⁷⁰ are sold to restaurants or other similar establishments for consumption at the place of purchase while closed containers are sold to retail stores and consumed in other locations.⁷¹ As evidenced by the distribution of two Coca-Cola bottlers, Panamco and Grupo Contal, the difference in sales for each is dramatic: 77 percent and 79.2 percent of sales were of closed containers, respectively, and 72 percent and 69.7 percent were sold to retail stores, respectively.⁷² Because the contrast in sales is so wide and consumers are generally not able to purchase closed containers at the same location as open containers, the CFC concluded that there are two very separate channels of distribution, open containers sold to restaurants and closed containers sold to retail stores.⁷³ Therefore the market for the case in question solely comprises closed containers sold to retail stores.⁷⁴

There are three types of carbonated drinks: colas, flavored

67. RLFCE, art. 11 (Mex.).

68. *Id.* at art. 12.

69. Pleno de la Comisión Federal de Competencia [CFC] [Federal Competition Commission], Propimex, S.A. de C.V. y Otros, Junio de 2005, DE-021-2003, Página 114 (Mex.).

70. In the United States, open containers of soda would be considered “fountain drinks.”

71. *Propimex*, DE-21-2003 at 109-11.

72. *Id.* at 109.

73. *Id.* at 110.

74. *Id.*

sodas, and mineral water. Other than flavor, the only difference between the carbonated drinks is the level of caffeine.⁷⁵ According to the CFC, any carbonated drink will satisfy the same needs of the consumer because of the lack of variation.⁷⁶ And since the technology of the manufacturing process of carbonated beverages is identical regardless of flavor or bottle size, colas, flavored sodas, and mineral water can be substituted one for another.⁷⁷ Therefore, the relevant market includes any carbonated drink.⁷⁸

The CFC also considered other beverages like bottled water, fruit juice, alcoholic drinks, hydrating drinks, milk, coffee, and tea as possible substitutes for carbonated beverages but determined that none met the consumers' identical needs.⁷⁹ Bottled water is consumed principally for health reasons due to the distrust of the tap water system.⁸⁰ The price of water and fruit juice varies so greatly from that of carbonated drinks that a rise in the price of these beverages would not cause consumers to switch.⁸¹ Alcoholic beverages are not adequate substitutes because of the restrictions placed on their sale and consumption, such as to whom they can be sold and where they can be consumed.⁸² Hydrating beverages are consumed after exercise, or other physical activity, and are not recommended at other times.⁸³ Milk, coffee, and tea generally require some form of preparation and are served hot.⁸⁴

The CFC concluded that the only appropriate substitutes that could meet the identical needs of consumers are other carbonated beverages sold in closed containers with the purpose of consumption in a place different from the point of purchase. Hence, the relevant product market in this case is carbonated beverages sold in closed bottles to retail stores.⁸⁵

2. Geographic Market Definition

The Commission next defined the relevant geographic market of manufacturing, distribution, and marketing possible substitutes from other areas. The Coca-Cola Export Company estab-

75. *Id.* at 106.

76. *Id.* at 107.

77. *Id.* at 109.

78. *Id.* at 106-09.

79. *Id.* at 111.

80. *Id.*

81. *Id.* at 112-13.

82. *Id.* at 113.

83. *Id.* at 114.

84. *Id.*

85. *Id.* at 111-14.

lished a franchise system in Mexico which authorizes bottlers to manufacturer, bottle, distribute, and sell the product to a previously designated area of Mexico.⁸⁶ Coca-Cola maintains seventy-nine bottling plants and 465 distributing centers throughout the country.⁸⁷ Coca-Cola has 1,100,000 points of sale throughout Mexico.⁸⁸ TCCEC manages the contracts with each bottler, supervises their operations, and directs the nation-wide publicity of the products.⁸⁹ The CFC determined that because of the magnitude of the interconnected Coca-Cola system, the relevant geographic area is the entire nation of Mexico with respect to the manufacturing, bottling, and transporting of the carbonated drinks in closed bottles and the coordination of TCCEC policies.⁹⁰

The marketing policies and promotions, such as free refrigerators to retailers, are devised and administered by the bottlers.⁹¹ These local marketing policies are the anticompetitive acts which the CFC has denounced. The acts occurred in the ten metropolitan areas where Ajemex is currently established which, according to the CFC, denote those ten cities as the relevant geographic area with respect to the distribution and marketing of carbonated drinks in closed bottles.⁹²

3. Market Power

Next, the Commission determined whether Coca-Cola sustained sufficient power in the relevant market to warrant a finding of liability for its anticompetitive practices. The regulatory factors which indicate market power are “sales indicators, number of customers, productive capacity, or any other factor that the Commission deems appropriate.”⁹³ Taking those factors into consideration, the principal question to answer is whether the firm in question “can unilaterally fix prices or restrict supply in the rele-

86. *Id.* at 114.

87. *Id.* at 116. Big Cola is relatively new to the country; it began selling its products in Mexico in March of 2002 and only has one bottling plant in the state of Puebla and twenty-five distributing centers.

88. *Id.*

89. *Id.* at 51.

90. *Id.* at 127. The Commission considered probable substitutes from other markets but found substitutes unlikely due to the high cost of switching markets and the low level importation despite soda's duty free status, as well as a single consumer protection law that restricts alternatives. *Id.* at 125-27.

91. *Id.* at 123.

92. *Id.* at 124.

93. Reglamento de la Ley Federal de Competencia Económica [RLFCE] [Federal Regulation of Economic Competition], art. 11, Diario Oficial de la Federación [DO], 4 de Marzo de 1998 (Mex.).

vant market without competitors being able to counteract such power either actually or potentially.⁹⁴

As a benchmark, the Commission used the standard in the industry for determining sales in the market: the percentage of sales for twenty-four eight ounce bottles of carbonated beverages.⁹⁵ Using this standard, Coca-Cola was responsible for 68.1 percent of sales throughout Mexico in 2001 and 70.6 percent in 2002;⁹⁶ however, that takes into account both open and closed containers and the relevant market for this case is only closed bottles.⁹⁷ But one bottler, Grupo Contal, estimated that 69.7 percent of its sales are closed bottles to retailers.⁹⁸ For this reason, the CFC deemed 69.7 percent a "consistent approximation" of the market power for the nationwide geographic market of the manufacturing, bottling, and transporting of the carbonated drinks in closed bottles and the coordination of TCCEC policies.⁹⁹

Since the CFC concluded that the relevant geographic market for the local marketing policies and promotions is the specific metropolitan areas where the denounced conduct occurred, the Commission calculated market power in each city by the percentage of each city based on the national per capita consumption.¹⁰⁰ Based on its calculations, the Commission determined that Coca-Cola's market power ranged from 65.9 percent to 85.99 percent in the ten individual metropolitan areas in 2002.¹⁰¹ This same method also found that the Coca-Cola system had an estimated national power of 69.5 percent of per capita consumption in 2002, which is nearly identical to the 70.6 percent based solely on volume of sales that year.¹⁰²

The Commission concluded that Coca-Cola had the capacity to set prices without a significant change in demand.¹⁰³ Its reasoning was based on three criteria: 1.) consumers prefer Coca-Cola

94. *Propimex*, DE-21-2003 at 127.

95. *Id.* at 127.

96. *Id.* at 128.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 130 n.4. The national per capita consumption is obtained by 1.) the estimated sale of sodas in the country in 2002 divided by 2,064,000,000 (the total amount of soda sold that year) and 2.) divided by the population in 2002 with a basis in the population in 2000 and applying annual growth rate of the same between 1995 and 2000. The state of Oaxaca was calculated based on the production of the plant in that area because the region is mountainous and sparsely populated.

101. *Id.* at 131.

102. *Id.*

103. *Id.* at 134.

brand soda over others;¹⁰⁴ 2.) the differentiation of products allows different pricing policies for different consumers;¹⁰⁵ and 3.) the fact that Coca-Cola products are more expensive than its competitors but continue to out sell those rivals.¹⁰⁶ Specifically, the introduction of different bottle types, sizes, and flavors, such as Lift and Coca Cola Lite, have increased sales and satisfied consumer needs, which have been accomplished even though competitors, like Pepsi, have lowered their prices on similar products.¹⁰⁷ The CFC rationalized that “Ajemex principally offered [similar] products . . . with a lower price, but this company has a reduced capacity to bottle and distribute its product and as such it would have no capacity to restrict the ability of the Coca-Cola system and its bottlers to set prices.”¹⁰⁸

4. Barrier to Entry

Any analysis of market power requires considering any barriers to entry into the relevant market. The Regulations define barriers to entry as 1.) financial costs to develop alternative channels; 2.) limited access to financing, technology, or efficient distribution channels; 3.) the amount of recoupment of the required investment; 4.) the need for governmental license or permits; 5.) the investment in advertising and lack of competition from international markets; 6.) restrictions based on common trade practices in the relevant market; and 7.) discriminatory practices of governmental officials in awarding government subsidies.¹⁰⁹ The first ele-

104. *Id.* at 131-32.

105. *Id.* at 132.

106. *Id.*

107. *Id.*

108. *Id.* at 134.

109. Reglamento de la Ley Federal de Competencia Económica [RLFCE] [Federal Regulation of Economic Competition], art. 11, Diario Oficial de la Federación [DO], 4 de Marzo de 1998 (Mex.). (“For the effects of Article 13, section II, of the Law, elements which may be regarded as entry barriers include the following: I. [f]inancial costs or the costs of developing alternative channels, limited access to financing, technology or efficient channels of distribution; II. [t]he amount, indivisibility and period of recoupment of the required investment, as well as the absence or scarce profitability of alternative uses of infrastructure and equipment; III. [t]he need to possess concessions, licenses, permits or any kind of governmental authorization, as well as rights of use or usufruct protected by legislation in the area of intellectual and industrial property; IV. [t]he investment in advertising required for a trademark or trading name to acquire a presence in the market sufficient to enable it to compete with already established trademarks or names; V. [t]he limitations on competition in international markets; VI. [t]he restrictions constituted by the common practice of the economic agents already established in the relevant market; and VII. [t]he acts of federal, state, or municipal authorities which discriminate in the awarding of

ment to analyze is “the financial costs to develop alternative channels, the limited access to financing, technology, or efficient distribution channels.”¹¹⁰ Coca-Cola’s distribution network is overwhelmingly large with 22,000 fleet vehicles, 11,000 routes and 3.18 visits per week to each point of sale.¹¹¹ The additional marketing and promotions, such as free refrigerators, contribute to the financial costs of participating in the soda market.¹¹² Initial investment in the industry is great, requiring approximately twelve months of work simply to construct a bottling plant.¹¹³ Competition in financing is particularly difficult because the Coca-Cola Company can provide lines of credit of \$250,000,000 to its subsidiaries.¹¹⁴ Because of the high cost of entry and distribution, the Commission reasoned that barriers to entry exist in distributing and marketing of the carbonated beverages in the ten relevant areas, as well as nationally.¹¹⁵

The need for government licenses, the actions of government officials, or competition from international markets did not pose any problems to enter the market but an investment in publicity did.¹¹⁶ Publicity included national television and radio advertising and supplying bottlers with money and merchandise to promote their own marketing policies.¹¹⁷ In 2002 alone, TCCC paid 6,672,000 Mexican pesos (USD 683,116.62)¹¹⁸ to the bottler Coca-Cola Femsa for marketing.¹¹⁹ The CFC reasoned that such a large amount paid by the parent company impedes a competitor’s ability to adequately invest and enter the market.¹²⁰ Barriers to entry were also found in the common practices of the market. In 2001, Coca-Cola Femsa reported receiving 385,730,000 Mexican pesos (USD 39,224,120.40)¹²¹ from TCCC just to purchase refrigerators,

promotional incentives, subsidies or assistance to certain producers or distributors, or firms marketing or supplying goods or services.”).

110. *Id.*

111. *Propimex*, DE-21-2003 at 120-22, 134.

112. *Id.* at 136.

113. *Id.* at 139. However, recoupment of one’s investment does not present a barrier to entry. *Id.* at 142.

114. *Id.* at 137.

115. *Id.* at 140.

116. *Id.* at 142, 144-46.

117. *Id.* at 143.

118. *Foreign Exchange Rates*, FEDERAL RESERVE STATISTICAL RELEASE (July 1, 2002), <http://www.federalreserve.gov/releases/G5/20020701/>.

119. *Propimex*, DE-21-2003 at 143.

120. *Id.* at 143-44.

121. *Foreign Exchange Rates*, *supra* note 118.

which was a common practice in the soda industry.¹²² The publicity and marketing expenses which are paid by the parent company and the common practices between parent and child companies create significant barriers to entry in the ten metropolitan areas where the anticompetitive conduct occurred.¹²³

5. Other Considerations

The next element to determine substantial market power is the existence and power of Coca-Cola's competitors. In 2002, the carbonated drink market was divided nationally among Coca-Cola at 70.6 percent, Pepsi at 19.3 percent, and all others at 10.1 percent.¹²⁴ Specifically, in the ten designated geographic markets, the combined power of Coca-Cola's competitors ranged from 14.7 percent to 34.1 percent.¹²⁵ The CFC concluded that this small market control by its competitors, combined with the general consumer preference toward Coca-Cola and the size of Coca-Cola's distribution system, proved low market capacity among Coca-Cola's competitors.¹²⁶

The Commission also considered Coca-Cola's competitors' access to input sources. Manufacturing and bottling carbonated soda require several elements, such as concentrates, sugar, aluminum to make cans, plastic to make bottles, and other necessary material. Larger companies have greater access to these materials than smaller, less-established companies through vertical integration.¹²⁷ For example, the Coca-Cola Company provides soda concentrates directly to its subsidiaries, the bottlers.¹²⁸ Another issue is joint ventures with manufacturers or producers of required material. One bottler, Coca-Cola Femsa, possesses 19.6 percent of the capital of an aluminum can producer.¹²⁹ Without these sources of materials, smaller companies are at a distinct disadvantage to their larger competitors.¹³⁰

6. The Commission's Conclusion

The Commission determined that Coca-Cola's ability to set

122. *Propimex*, DE-21-2003 at 145.

123. *Id.* at 144-46.

124. *Id.* at 146.

125. *Id.* at 147.

126. *Id.* at 148.

127. *Id.* at 149.

128. *Id.*

129. *Id.* at 150.

130. *Id.*

prices and the barriers to entry showed its strong presence in the market.¹³¹ Specifically, the CFC found substantial market power in the distributing and marketing of carbonated drinks in closed bottles of twenty-one different bottlers or subsidiaries in the ten metropolitan areas where the anticompetitive conduct occurred.¹³² The CFC also ruled that TCCEC maintained substantial power nationally in the manufacturing, bottling, transporting, and distributing market.¹³³ Because the offending parties held substantial market power in the relevant market, the CFC concluded that each of the twenty-two enumerated entities within the Coca-Cola system that could be found liable for the stated violations of the LFCE were in fact liable.¹³⁴

7. Defense Arguments

After the initial finding of liability, the denounced parties filed arguments explaining why they were not liable for the denounced conduct.¹³⁵ As a result, seven different bottlers or their subsidiaries were declared innocent.¹³⁶ The bottlers and their subsidiaries were able to show that they did not fall into the relevant geographic market, the actions of another were mistaken for their own, the connection to a subsidiary was too weak, or the services they provided within the Coca-Cola system did not meet the relevant market.¹³⁷

The CFC then proceeded to respond to the arguments of the fifteen remaining entities. The main contention was the lack of evidence that the denounced conduct was part of a system-wide policy, but that the evidence proved the contrary.¹³⁸ The defendants presented several areas throughout Mexico where Coca-Cola and Big Cola are both sold but where there were no anticompetitive practices.¹³⁹ They also contended that had there been a system-wide policy, each bottler would have committed the same anticompetitive acts, when in fact some signed exclusive dealing contracts with the retailers, others refused to sell to certain retailers, others gave incentives to retailers, and others destroyed Big

131. *Id.* at 134, 140, 146.

132. *Id.* at 153-54.

133. *Id.*

134. *Id.* at 154.

135. *Id.* at 155.

136. *Id.*

137. *Id.* at 156-58.

138. *Id.* at 164-65.

139. *Id.*

Cola merchandise and advertising.¹⁴⁰

The CFC responded to the defendants' arguments by concluding that the denounced acts were clearly a result of a policy by Coca-Cola.¹⁴¹ The established franchise system supports a finding of a cooperative, concerted effort.¹⁴² The CFC determined that the combined producing, bottling, distributing, and marketing create a cycle in which each entity participates, and without such participation in the interrelated activities, the system would fail.¹⁴³ TCCEC was specifically involved through its publicity and marketing in mass media, in addition to manufacturing concentrates and developing procedures for the sale of its goods.¹⁴⁴

The Commission reasoned that the single entity view protects a franchise system from certain violations of the competition law. "If those that form a franchise were independent [then] . . . [the] territorial divisions in which they work . . . could be considered a monopolistic practice."¹⁴⁵ TCCEC has divided Mexico geographically and enters into contracts with bottlers which prohibit them from operating in a different geographic area.¹⁴⁶ Generally, the geographic dividing of markets is an absolute monopolistic practice, or a per se violation according to Article 9 of the LFCE.¹⁴⁷ However, because it occurred within the Coca-Cola system, amongst a single entity, it is not viewed as an unlawful division.¹⁴⁸ The Commission, therefore, concluded that protection against one violation provides the basis of liability for another violation.¹⁴⁹ Accordingly, each component within the Coca-Cola entity, including the head of the TCCEC organization, is co-responsible for the decisions made by and within the system.¹⁵⁰

140. *Id.*

141. *Id.* at 181-82.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 181.

146. *Id.*

147. Ley Federal de Competencia Económica [LFCE][Antitrust Law], *as amended*, art. 9 § III, Diario Oficial de la Federación [DO], 24 de Diciembre de 1992 (Mex.). ("Absolute monopolistic practices are . . . dividing, distributing, assigning or imposing portions or segments of an actual or potential market of goods or services by determined or determinable clientele, providers, times or areas.").

148. *Propimex*, DE-21-2003 at 181.

149. *Id.*

150. *Id.* The U.S. Supreme Court agreed with this view in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) ("[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of section one of the Sherman Act.").

8. Punishment

According to Article 35 of the LFCE, the CFC can impose a fine up to 225,000 times the daily minimum wage in the Federal District and suspend relative monopolistic practices.¹⁵¹ However, “in the event of a repeated offense, an additional fine may be assessed up to twice the initial amount.”¹⁵² The daily minimum wage for the Federal District, Mexico City, was 48.6 Mexican pesos (USD 4.63)¹⁵³ at the time of this case.¹⁵⁴ The LFCE provides the criteria by which a fine is assessed: “the seriousness of the violation, the damage caused, the degree of premeditation, the participation in the markets of the infringer, the size of the market affected, the length of the practice or concentration and the recurrence or background of the infringer, and also its financial status.”¹⁵⁵ The Commission evaluated each element individually for each defendant, but because the acts were committed by various groups and subsidiaries of a single entity, the Commission’s findings of each criterion was the same for all defendants, with minor exceptions.¹⁵⁶

The CFC concluded that the conduct was serious because it impeded the process of competition and the free market.¹⁵⁷ The barrier to consumer choice caused harm to an individual’s right; the CFC did not look at any economic damage to Ajemex.¹⁵⁸ The Commission’s conclusion on this point follows the constitutional right to freely access the market as opposed to a legislative ability to be compensated for economic harm.¹⁵⁹ The CFC found that the consequences of restricting market access and the ability of consumers and retailers to choose were foreseeable and Coca-Cola’s acts were therefore intentional.¹⁶⁰ Though market participation

151. LFCE, art. 9 § V (Mex.). The statute allows aggrieved parties to receive compensation for the damages they incurred as a result of the anticompetitive practices. The party must file a separate claim to recoup.

152. *Id.*

153. *Foreign Exchange Rates*, FEDERAL RESERVE STATISTICAL RELEASE (July 1, 2002), <http://www.federalreserve.gov/releases/G5/20020701/>.

154. The fine was \$10,530,000, which divided by 225,000 (the percentage imposed) equals 48.6.

155. LFCE, art. 36 (Mex.).

156. Pleno de la Comisión Federal de Competencia [CFC] [Federal Competition Commission], *Propimex, S.A. de C.V. y Otros*, Junio de 2005, DE-021-2003, Página 341-437 (Mex.).

157. *Id.* at 342.

158. *Id.* at 341.

159. Constitución Política de los Estados Unidos Mexicanos [Const. 1857], art. 28, *Diario Oficial de la Federación* [DO], 5 de Febrero de 1857 (Mex.).

160. *Propimex*, DE-21-2003 at 344.

and size differed for each defendant depending on their location, each participated substantially to warrant a fine.¹⁶¹ The duration of the conduct was determined to be at least from the time the complaint was filed with the CFC.¹⁶² The Commission defines recidivism as committing the same specific violations.¹⁶³ Coca-Cola had never previously violated sections IV and V of Article 10 of the LFCE and therefore recidivism was not an issue.¹⁶⁴ The CFC also found that the defendants had sufficient economic power and resources to pay the maximum fine for each defendant.¹⁶⁵ The Commission concluded that because there is such a high per capita Coca-Cola consumption rate, each bottler and their subsidiaries had enough resources to pay a fine.¹⁶⁶

Each of the fifteen liable entities¹⁶⁷ was fined the maximum amount, 225,000 times the daily minimum wage for Mexico City, which totaled 10,530,000 Mexican pesos (USD 973,197.78)¹⁶⁸ each.¹⁶⁹ The combined total of all the defendants, 157,950,000 pesos¹⁷⁰ (USD 14,597,966), is one of the largest antitrust fines in Mexico's history.¹⁷¹ The Commission also ordered the suppression of these practices.¹⁷²

V. ANALYSIS

The Commission spends a considerable amount of time detailing the incentives for compliance with the requirements Coca-Cola imposed on the retailers. Some of these vertical non-price restraints are similar to the actions taken by a Texas Coca-Cola bottler in the Texas Supreme Court case, *Coca-Cola Co. v. Har-*

161. *Id.* at 345-46.

162. *Id.* at 346.

163. *Id.*

164. *Id.*

165. *Id.* at 347

166. *Id.*

167. *Id.* (referring to TCCEC, Coca-Cola Femsa, Propimex, Inmuebles de Golfo, Panamco México, Panamco Bajío, Panamco Golfo, Grupo Contal, Embotelladora La Favorita, Embotelladora Zapporan, Industrial Refresco Peninsular, Embotelladora La Victoria, Embotelladora Refresco Victoria del Centro, and Embotelladora San Juan).

168. Based on the June 2005 exchange rate. See *Foreign Exchange Rates*, FEDERAL RESERVE STATISTICAL RELEASE (July 1, 2005), <http://www.federalreserve.gov/releases/G5/20050701/g5.htm>.

169. *Propimex*, DE-21-2003 at 340-437.

170. See *Foreign Exchange Rates*, FEDERAL RESERVE STATISTICAL RELEASE (July 1, 2005), <http://www.federalreserve.gov/releases/G5/20050701/g5.htm>.

171. Hider, *supra* note 19, at 3.

172. *Propimex*, DE-21-2003 at 439.

*mar Bottling Co.*¹⁷³ In that case, the bottler was sued for its practice of calendar marketing agreements requiring promotional preferences, displaying of products in “impulse zones,” enlarging cooler space, and reducing prices.¹⁷⁴ Retailers received discounts, promotions, and bonuses for their compliance and promotional efforts.¹⁷⁵ The main issue was whether the bottler used its “dominant position in [the region] to aggressively negotiate [its agreements with retailers] with terms that suppressed competition from other bottlers.”¹⁷⁶ The bottler controlled seventy-five percent to eighty percent of the relevant market,¹⁷⁷ similar to the 65.9 percent to 85.99 percent of the relevant metropolitan markets in *Big Cola*.¹⁷⁸ The defendants in *Harmar* were found liable and fined USD 14,644,696.40 by the District Court.¹⁷⁹ That fine mirrors the approximate USD 14,597,966 that the Coca-Cola defendants were fined in Mexico.¹⁸⁰

However, the Texas Supreme Court overruled the finding of liability in *Harmar* because only potential damages to the defendants were proven, not actual.¹⁸¹ Actual economic damage is required to find liability for using one’s dominant market power to impose restrictions on retailers in the United States.¹⁸² This result differs from *Big Cola* in that the CFC did not consider actual, or even potential damages to Ajemex but reiterated the constitutional right to competition and free access to the market.¹⁸³ The CFC stated that liability is imposed when there is “detriment to

173. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006).

174. *Id.* at 676. Retailers were not prohibited from selling competitors’ products like many retailers in Mexico were required to do by Coca-Cola.

175. *Id.*

176. *Id.*

177. *Id.* at 674-675. The geographic area covered the four neighboring states, Arkansas, Texas, Louisiana, and Oklahoma, where plaintiffs and defendants operated concurrently. The bottlers only sold retail to the public in supermarkets, convenience stores, small grocery stores, and other outlets. These facts are analogous to *Big Cola* in which bottlers only sold to retail stores and the geographic area was confined to the ten metropolitan areas where both companies directly competed with each other.

178. Pleno de la Comisión Federal de Competencia [CFC] [Federal Competition Commission], *Propimex, S.A. de C.V. y Otros*, Junio de 2005, DE-021-2003, Página 131 (Mex.).

179. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 678 (finding treble damages minus attorney fees).

180. *Propimex*, DE-21-2003 at 340-437. See generally *Foreign Exchange Rates*, FEDERAL RESERVE STATISTICS (July 1, 2005), <http://www.federalreserve.gov/releases/G5/20050701/g5.htm>.

181. *Harmar*, 218 S.W.3d at 689-91.

182. *Id.*

183. *Propimex*, DE-21-2003 at 343-44.

the national economy and prejudice to society in general.”¹⁸⁴ Without the need to show actual economic damage, it is easier to find liability for vertical non-price restraints in Mexico than in the United States. Several specific rulings cited in *Big Cola* exemplify this strict approach, which favors antitrust liability and imposes greater burdens on dominant firms.

For example, an exclusive dealing contract in the United States may be challenged under either Section One of the Sherman Act, Section Three of the Clayton Act, or Section Five of the Federal Trade Commission (FTC) Act.¹⁸⁵ The Sherman Act restricts contracts “in restraint of trade,”¹⁸⁶ while the Clayton Act forbids contracts that “substantially lessen competition or tend to create a monopoly in any line of commerce,”¹⁸⁷ and the FTC Act prohibits “unfair methods of competition in or affecting commerce.”¹⁸⁸ These statutes seek to curtail “[e]xclusive dealing arrangements [that] foreclose buyers from purchasing goods from suppliers of their choice and thereby foreclose other suppliers’ access to outlets for their products.”¹⁸⁹ Even though competition may be lessened, some exclusive dealing contracts may have pro-competitive effects.¹⁹⁰ “In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller’s point of view, requirements contracts may make possible the substantial reduction of selling

184. *Id.* at 344.

185. Arthur I. Cantor, *Tying, Exclusive Dealing and Franchising Issues*, 1670 PLI/CORP. 427, 497 (May-June 2008). Much of the analysis in this paragraph and the following paragraph is based on Mr. Cantor’s article.

186. Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2004)).

187. Clayton Antitrust Act, ch. 323, § 3, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 14 (1914)).

188. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45 (2006)).

189. Cantor, *supra* note 185, at 497.

190. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977) (finding that vertical restraints can promote interbrand competition thereby achieving certain efficiencies in the distribution of its products); *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1468 (9th Cir. 1986) (preventing free-riding and concluding that such a concern is both legitimate and lawful); *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1196, 1219 (W.D.N.C. 1989) (finding that requirement contracts can be beneficial to newcomers in the market); *Haagen-Dazs Co., Inc. v. Double Rainbow Gourmet Ice Creams, Inc.*, No. 88-15043, 1990 WL 12148, at *1, *5 (9th Cir. Feb. 8, 1990) (deciding that exclusive dealing agreements ensure that distributors are wholly committed to marketing Haagen-Dazs products).

expenses, give protection against price fluctuations, and – of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified – offer the possibility of a predictable market.”¹⁹¹

For that reason, exclusive dealing contracts “are considered unreasonable only when the portion of the market foreclosed to other sellers or buyers is substantial enough to adversely affect competition.”¹⁹² To assess whether these contracts have sufficiently foreclosed the market to competitors, there must be a rule of reason analysis, which examines the violation in relation to the violator and market.¹⁹³ In the United States, the rule of reason analysis considers: 1.) relevant market definition; 2.) percentage of market foreclosed;¹⁹⁴ 3.) barriers to entry;¹⁹⁵ 4.) terms of the agreement;¹⁹⁶ 5.) ability to terminate;¹⁹⁷ 6.) other distributing channels;¹⁹⁸ 7.) nature of purchaser;¹⁹⁹ 8.) nature of product;²⁰⁰ 9.) use of exclusive dealing by competitors;²⁰¹ 10.) actual competitive

191. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 306-07 (1949).

192. Cantor, *supra* note 185, at 498.

193. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

194. *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 46 (1998) (finding thirty-eight percent market foreclosure lawful); *see also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982), *cert. denied*, 459 U.S. 1009 (1982) (finding twenty-four percent foreclosure over a long period of time unlawful); *Tele Atlas N.V. v. NAVTEQ Corp.*, No. C-05-01673 RMW, 2008 WL 4809441, at *1, *20 (N.D. Cal. Oct. 28, 2008) (reaffirming *Twin City Sportservice, Inc.*); 1 ABA Section on Antitrust Law, *Antitrust Law Developments* 222 (Debra J. Pearlstein et al. eds., 5th ed. 2002) (“[J]udicial decisions have established a virtual safe harbor for market foreclosure of twenty percent or less.”).

195. *See Minn. Mining and Mfg. Co. v. Appleton Papers, Inc.*, 35 F. Supp. 2d 1138 (D. Minn. 1999) (concluding that high entry barriers create likelihood of anticompetitive effect).

196. *See Twin City Sportservice, Inc.*, 676 F.2d at 1292 (finding a ten year market foreclosure unlawful); *see also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) (finding a two year market foreclosure lawful).

197. *See Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) (holding that an agreement terminable in less than one year is presumptively lawful); *see also Appleton Papers, Inc.*, 35 F. Supp. 2d 1138 (concluding that incentives in the agreements made it difficult to switch suppliers).

198. *See Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555 (11th Cir. 1991).

199. *See Tampa Elec. Co.*, 365 U.S. 320 (1961) (explaining that the purchaser was an end-user, not a distributor).

200. *See Richard M. Steuer, Exclusive Dealing in Distribution*, 69 CORNELL L. REV. 101, 122 (1983) (“Exclusive dealing in convenience products [as opposed to shopping products] that results in foreclosure of retailers is more likely to cause foreclosure of those retailers’ customers.”).

201. *See United Air Lines, Inc. v. Austin Travel Corp.*, 681 F. Supp. 176 (S.D.N.Y. 1988) (holding an exclusive dealing agreement lawful where competitors have similar contracts), *aff’d*, 867 F.2d 737 (2d Cir. 1989).

impact;²⁰² 11.) business justifications;²⁰³ and 12.) the seller's market power.²⁰⁴

The LFCE and its Regulations provide similar criteria for legal analysis as seen in the *Big Cola* determination of market definition, market power, and penalty determination.²⁰⁵ Specifically, exclusive dealing contracts can be found to have pro-competitive effects such as “the significant reduction of administrative costs” and the “lowering of production or marketing costs derived from the expansion of an infrastructure,” which would negate liability.²⁰⁶ However, the only elements of conviction are that the acts be carried out within a market in which the actor has substantial power and does not require market foreclosure as the U.S. does.²⁰⁷ Because market foreclosure is not a requirement, the only meaningful issues are whether the firm maintains substantial market

202. See *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993) (“[T]he probable effect of the [exclusive] contract on the relevant area of effective competition, taking into account . . . the probable immediate and future effects . . . of that share of the market might have on effective competition therein.” (quoting *Tampa Elec. Co.*, 365 U.S. at 329)).

203. See *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984) (taking business justifications into account).

204. *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311 (8th Cir. 1986) (concluding that the seller must have market power).

205. See *Ley Federal de Competencia Económica [LFCE][Antitrust Law]*, as amended, art. 12, 13, *Diario Oficial de la Federación [DO]*, 24 de Diciembre de 1992 (Mex.).

206. See *Reglamento de la Ley Federal de Competencia Económica [RLFCE][Federal Regulation of Economic Competition]*, art. 6, *Diario Oficial de la Federación [DO]*, 4 de Marzo de 1998 (Mex.) (“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 participation in the market, which must be taken into consideration in the evaluation of the conduct referred to in Article 10 of the Law. Such gains in efficiency are deemed to include the following, among others: I. [t]he obtaining of savings in resources which permit the accused/alleged violator, on a permanent basis, to produce the same quantity of the good at a lower cost, or a greater quantity at the same cost; II. [t]he obtaining of lower costs if two or more goods or services are produced jointly than when separately; III. [t]he significant reduction of administrative costs; IV. [t]ransfer of production technology, or knowledge of the market; and V. [l]owering of production or marketing costs derived from the expansion of an infrastructure or distribution network.”).

207. *Ley Federal de Competencia Económica [LFCE][Antitrust Law]*, as amended, *Diario Oficial de la Federación [DO]*, 24 de Diciembre de 1992 (Mex.). Article 10 defines relative monopolistic practices “subject to verification of articles 11, 12 and 13 of this Law.” *Id.* Even if the CFC took market foreclosure into account, it is doubtful that liability would have been found in this case. Compare *Bell*, *supra* note 33, with *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 46 (1998) (finding thirty-eight percent market foreclosure lawful), and *Pearlstein*, *supra* note 194 (“[J]udicial decisions have established a virtual safe harbor for market foreclosure of twenty percent or less.”).

power, has signed an exclusive dealing contract (which virtually guarantees that liability will be found even though the CFC examines the violation in relation to the violator and market), and takes it into consideration.²⁰⁸ For this reason, the rule of reason test in Mexico should be more accurately called *per se light*.

Mexico's strict approach to antitrust enforcement is also found in the CFC's imposition of fines. The probability of a fine is a deterrent when "the fine is an amount that in general is greater than the gain [from anticompetitive behavior]."²⁰⁹ In *Big Cola*, the Commission found the fifteen defendants liable of two separate offenses: exclusive dealing contracts and refusals to deal.²¹⁰ The statute states the fine for such actions is 225,000 times the Mexico City daily minimum wage "for having engaged in any relative monopolistic practice."²¹¹ Despite two violations of the law, the CFC only fined each defendant the maximum penalty for one relative monopolistic practice;²¹² however, a non-immediate threat is still posed to Coca-Cola in Mexico. "In the event of a repeated offense, an additional fine may be assessed up to twice the initial amount."²¹³ According to the LFCE, if Coca-Cola commits either of these violations again, it could be fined an amount double that which it was fined for the *Big Cola* violation.²¹⁴

Though recidivism was not a factor in this case, the Commission analyzed the exact same history for each defendant, including Coca-Cola's proposed merger with Cadbury Schweppes.²¹⁵ The bottlers and their subsidiaries were not involved in that proposition, as it was done on a corporate level. Nonetheless, the CFC considered the corporate act in its analysis of each of their penalties. If the previous act had been an exclusive dealing contract or refusal to deal agreement, then those acts would have been considered just as the Cadbury Schweppes ruling. All parties involved the

208. FERNANDO SÁNCHEZ UGARTE ET AL., *COMPETENCIA ECONÓMICA EN MÉXICO* 20 (Editorial Porrúa) (2004) ("Rule of Reason will have greater possibilities to be efficient by requiring a showing that the investigated company possess substantial power in the relevant market and that there don't exist efficiencies in the executed conduct.").

209. *Id.*

210. Pleno de la Comisión Federal de Competencia [CFC] [Federal Competition Commission], *Propimex, S.A. de C.V. y Otros*, Junio de 2005, DE-021-2003, Página 104 (Mex.).

211. LFCE, art. 35 (Mex.).

212. *See Propimex*, DE-021-2003 at 437.

213. Reglamento de la Ley Federal de Competencia Económica [RLFCE] [Federal Regulation of Economic Competition], art. 35, *Diario Oficial de la Federación* [DO], 4 de Marzo de 1998 (Mex.).

214. *Id.*

215. *See Propimex*, DE-021-2003 at 436.

second time would have been fined doubled, regardless of their involvement in the first violation. One can therefore assume that if any recidivist act had been committed by TCCEC, all others involved in this second act would be fined double because of the previous actions of one co-defendant within the Coca-Cola system; once a portion of the entity has been found guilty of a particular violation, the entire system is considered tainted. Just as TCCEC was responsible here for the actions of the bottlers, the bottlers would be responsible for the actions of TCCEC.²¹⁶ This follows the CFC's stated position that a franchise system is one single entity instead of several independent actors²¹⁷ but expands the rule to include top down liability: a subsidiary is responsible for the actions of its parent company.²¹⁸ This way the Commission encourages greater compliance with competition laws by holding parent companies responsible for their subsidiaries and vice-versa.

VI. CONCLUSION

The rigid approach demonstrated by the CFC's analysis of refusal to deal agreements, exclusive dealing contracts, and imposition of fines in *Big Cola* is consistent with the overall goal of Mexico's antitrust law: ensuring "access to quality, cheap consumer goods and . . . market access" to competitors.²¹⁹ The CFC's harsh interpretation of the competition law for antitrust enforcement resulted in one of the largest antitrust fines in Mexico's history and stopped explicitly anticompetitive acts from continuing even though they likely would have continued in the U.S.²²⁰ Mexico's strict attitude may be related to its economic history of

216. *Id.* at 181.

217. *Id.*

218. If a parent company is not significantly involved in the operations of a subsidiary or if the services of a parent are not part of the relevant product market, then liability is mitigated if not negated. *Id.* at 154. However, mass media marketing constitutes sufficient involvement of a parent. *Id.* at 179-81.

219. PASCUAL GARCIA ALBA IDUÑATE ET AL., LA PRIMERA DÉCADA DE LA COMISIÓN FEDERAL DE COMPETENCIA 136 (La Comisión Federal de Competencia de los Estados Unidos Mexicanos 2003) (author's translation).

220. Hider, *supra* note 19. See also *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 689-91 (Tex. 2006) (actual harm required); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 46 (1998) (finding thirty-eight percent market foreclosure lawful); Pearlstein, *supra* note 194 ("[J]udicial decisions have established a virtual safe harbor for market foreclosure of twenty percent or less.").

exploitation and monopoly control,²²¹ but regardless of the reason, the greater probability of finding violations and the higher fines imposed will cause fewer monopolistic acts to occur.

221. Ugarte, *supra* note 1, at 36.