

*Exclusivity and loyalty
Arrangements under Mexican
Competition Law.*

Gabriel Castañeda
Castañeda y Asociados
Mexico City

Exclusivities and loyalty arrangements. RATIONALE.

- For the manufacturer, an efficient alternative to vertical integration.
- For the seller, benefits in exchange for more sales.
- For the economy, a valuable tool to prevent free-ride on investments.
- For the competitive process, harmful when they exclude competition in a PREDATORY and in MEANINGFUL degree.

The Mexican statute. ORIGINAL THOUGHTS.

- Drafters located these practices as rule-of-reason.
- "Because these restrictions are pro-competitive, the statute must be careful by making sure that...their anti-competitive impact is effectively dominant...and they should be assessed at market level and not firm by firm, because inter-brand competition and generally substitute products are usually sufficient to keep monopoly power under control".
- [Technical]"Criteria create a system of filters to warrant that only those practices that harm competition are subject to penalties by the authority."

The statute's LEGAL PROVISIONS. (FILTERS).

- A technically defined product and geographic relevant market.
- Empirical determination of substantial power in the relevant market.
- Substantial foreclosure/displacement in the relevant market.
- Balancing assessment:
 anticompetitive effects > than efficiencies

Specific statutory's OFFENSES.

- Imposition of exclusive territories or clients;
- Selling conditioned to not dealing with products of a third party;
- (New since 2006): discounts or incentives tied to the obligation not to deal with products of a third party.

EARLY CFC CASES.



- PEMEX (1999): monopoly may not impose territorial limits on gasoline stations, nor exclusive suppliers.
- Airport services (1999). ASA, a designated monopoly, may not grant exclusivity contracts to set-up duty-free shops without competitive bidding.

THE PEPSI CASES vs. Coke bottlers

(2000)

- Evidence: a) 218 affidavits by small mom and pop retailers stating that they do not sell pepsi; b) a "sample", paid by pepsi, of 1929 stores (coke "only": 83%/pepsi "only" 17%);
- Relevant market: carbonated soft drinks on a national basis;
- Market power: "jointly" enjoyed by the "Coca-Cola Group" (the sum of all bottlers of coke products): 73% national market share;
- Main defenses: a) no evidence of substantial foreclosure/displacement (218 stores, out of a 1,000,000 outlets); b) biased affidavits and "sample" not statistically representative/valid; c) defective relevant market and market power assessments.

THE PEPSI CASES vs. Coke bottlers

(2000)

- CFC proceedings: a) CFC refused to admit expert opinions on economics and econometrics; b) expert opinions on finance and accountance also thrown out; c) new affidavits not admitted.

The CFC ruled against coke bottlers: for "supplying products under the condition not to sell products manufactured by a third party". Fines: US 1m to each bottler.

CFC standards set:

- Substantial foreclosure/displacement: sufficient to prove in a range of .00015 % and .0011 % of the relevant market (15 in every 100,000 stores/11 in every 10,000);

THE PEPSI CASES vs. Coke bottlers

(2000)

- Damage to competition: if defendants are proven to obtain a market-share increase of more than 4 percentage points, even if unrelated to alleged offenses;
- Market power: sufficiently proven if it is "jointly" held by a "Group": 65% market share;
- Expert opinions on economics may be legally refused by the CFC, because "CFC commissioners have outstanding professional experience and specialized knowledge in economics".
- Some cases upheld by courts, others pending and ONE attracted by the Supreme Court.

THE AJEMEX CASES (2003).

Similar quantitative standards, evidence refused on similar grounds and similar fines imposed by the CFC.

Most cases upheld by courts. The leading criteria applicable in the First Circuit (Mexico City) by the 4th. Tribunal:

- "Best available information is sufficient" for the CFC to indict defendants;
- "Uncorroborated affidavits are sufficient" when there is a "accumulative effect is confirmed by the CFC";

THE AJEMEX CASES (2003).

- Proof of rule- of- reason offenses require no "further analytical rigour"...do to "care of defendants to cover or hide any trace" of wrongdoings;
- The CFC is allowed to refuse to hear expert opinions, even in breach of constitutional process of law, "when the bundle of direct or indirect evidence is trustworthy...as confirmed by the CFC.

THE SUPREME COURT.

THE Court is expected to review some of the analytical and procedural standards, as it attracted one of these cases. Hopefully, to confirm or reconstruct main elements:

1. What is the "substantial" foreclosure degree/displacement needed for illegality?
2. Has the CFC the monopoly of economic wisdom?
3. Is the preservation of CFC rulings more important than constitutional due process of law?